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Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

H&R BLOCK, INC.; H&R BLOCK TAX SERVICES, INC.;
H&R BLOCK EASTERN TAX SERVICES, INC.;
ROBERT HECKERT; CYNTHIA LANTZ; CLARENCE E. MILLER;
CARLA R. LEWIS; DEBRA RIGGLEMAN; AND JOHN DOE,
Petitioners,

v.

DEADRA R. CUMMINS; IVAN BELL; AND LADONNA BELL,
ON THEIR OWN BEHALF AND ON BEHALF OF
THOSE SIMILARLY SITUATED,
Respondents.

Petition for a Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the fact that an arbitration provision prohibits a party from pursuing a class action provides a valid legal basis, consistent with the Federal Arbitration Act (FAA), for holding the arbitration provision unconscionable and refusing to enforce the agreement to arbitrate?

2. Whether, under the FAA, when an arbitration provision in a contract specifies that the validity and enforceability of the provision is to be decided by the arbitrator, a court still retains the power to decide that the agreement to arbitrate is substantively unconscionable as applied to a particular dispute?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

In addition to the petitioners and respondents listed below, the parties in the litigation below include Block Financial Corporation and H&R Block Services, Inc., both of which were added by respondents in a second amended complaint filed subsequent to the decision under review. Respondents have also named, but never served, three individual defendants, Melanie Lester, Jason Brown, and Bobby Hague.

Petitioner H&R Block, Inc., is a publicly held company traded on the New York Stock Exchange. Each of the other corporate petitioners is a direct or indirect subsidiary of H&R Block, Inc. No publicly held company owns 10% or more of the stock of H&R Block, Inc., and no publicly held company other than H&R Block, Inc. owns 10% or more of any of the other petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners H&R Block, Inc. *et al.*, respectfully request that the Court grant a writ of certiorari to review the judgment of the Circuit Court of Kanawha County, West Virginia.

OPINION BELOW

The order of the Circuit Court of Kanawha County, West Virginia, declining to compel arbitration, is unreported and is reprinted at Pet. App. 3a-15a. The order of the Supreme Court of Appeals of West Virginia denying Petitioners' Petition for Writ of Prohibition is reprinted at Pet. App. 1a-2a.

JURISDICTION

The order of the Circuit Court of Kanawha County, West Virginia denying the Petitioners' motion to compel arbitration was filed June 1, 2004. Petitioners' timely Petition for Writ of Prohibition was denied by the West Virginia Supreme Court of Appeals on September 2, 2004. This petition was filed within 90 days of September 2, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) An interlocutory ruling of a state court refusing to enforce an arbitration clause, once appealed as far as possible within the state court system, is "final" for purposes of section 1257(a). *Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984).

STATUTE INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction,

> or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Petitioners – H&R Block, Inc., several of its affiliate companies, and six of its current or former employee tax preparers – seek review of an order of the Circuit Court of Kanawha County, West Virginia refusing to enforce an arbitration agreement. The Supreme Court of Appeals of West Virginia declined to issue a writ of prohibition to review the trial court's ruling. The trial court's decision reflects an outright antagonism toward arbitration that has recently emerged in West Virginia state law, in disregard of section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2. Two key facets of that antagonism are (1) the rule, established by the Supreme Court of Appeals, that an arbitration clause is unconscionable if it does not preserve the right to litigate claims on a class basis, *see State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002), *cert. denied*, 537 U.S. 1087 (2002), and (2) the tendency, illustrated by the Circuit Court in this case, to decide issues of enforceability in the face of an explicit arbitration provision reserving questions of "enforceability" for the arbitrator.

The West Virginia court's ruling on class actions is on one side of a massive split that has developed across jurisdictions about whether an arbitration agreement is unconscionable if it waives the procedural option of litigating claims as a class action. By holding that such waivers of class litigation are unconscionable, West Virginia courts have

invited plaintiffs in consumer litigation to annul otherwise-valid arbitration agreements in their entirety, simply by styling their claims as class actions. And the very nature of class actions means that defendants doing business around the country may be exposed to nationwide class actions, including customers from jurisdictions that respect such arbitration clauses, as long as at least one jurisdiction chooses to disregard the applicable arbitration provision and allow classwide claims to proceed. Plaintiffs, in turn, will seek out such accommodating jurisdictions in which to file their class actions. This situation is untenable given the uniform pro-arbitration goals of the FAA. And there is no indication that it will disappear on its own.

In addition, the Court is presented in this case with a simpler yet no less important question: whether a court may disregard the parties' express agreement to arbitrate "enforceability" of an arbitration provision and resolve questions of enforceability, including claims of unconscionability, itself. This too is a matter warranting clarification by this Court.

1. Petitioners provide income tax preparation services for individual taxpayers. Their customers who choose to file their returns electronically and who are due tax refunds become eligible to be offered Refund Anticipation Loans ("RALs") from a third-party lender (the "bank"). RALs are short-term loans secured by, and payable from, the tax refund that customers expect to receive from the Internal Revenue Service. The bank is the actual lender on the loans.

Respondents are individuals who obtained RALs from the bank through offices of petitioners over the last decade. Respondent Cummins obtained her RALs in a number of different years including 1999 through 2002. Respondents Ivan and LaDonna Bell jointly obtained their RALs from 1997 through 2002. On July 29, 2003, they filed a First

Amended Complaint, on behalf of themselves and a putative class of West Virginia customers who obtained RALs in previous years, alleging breach of fiduciary duty, breach of contract, unjust enrichment, unfair or deceptive acts or practices, and violation of West Virginia's statute governing credit service organizations. In general, the respondents alleged that they and other West Virginia class members were improperly led to believe that their tax preparer was acting in a fiduciary relationship with them when offering the RALs on behalf of the bank and were unaware that petitioners received monetary compensation from the bank. The respondents also alleged that the structure of the RAL program is itself unsound under state law.

Respondents all executed RAL Applications containing an Arbitration Provision when applying for their RALs. Although the exact language of each Provision varies from year to year, the material provisions of each Agreement are substantially the same. For example, in 2002, respondents signed RAL applications containing an Arbitration Provision (reprinted in full at Pet. App. 16a-20a) in which they agreed that:

> any claim, dispute or controversy, whether in contract [or] tort (intentional or otherwise), whether pre-existing, present or future, and including constitutional, statutory, common law, regulatory, and equitable claims with [petitioners] in any way relating to (a) the [loan] [d]ocuments or a similar documents [sic] for prior years, (b) advertisement, promotions, or oral or written statements related to RALs and/or (c) the relationships of the parties, including the validity, enforceability or scope of this Arbitration Provision or any part thereof . . . shall be resolved, upon the election of either [party], by

> binding arbitration pursuant to this Arbitration Provision. . . .

Pet. App. 16a-17a.

The Arbitration Provision also included a few other provisions of note. First, the bank and petitioners are barred from invoking their right to arbitrate any claim filed solely in a small claims court or equivalent court, a limitation that does not apply to the customer, who retains the right to elect arbitration of any claims. Pet. App. 17a. Second, the Provision clarified that "[n]othing in this Arbitration Provision shall be construed to prevent" the lending bank from offsetting the customer's tax refund against any amount owed on prior RALs or other bank debts, Pet. App. 18a, – a process done automatically and requiring no judicial or arbitral forum.

Third, the Provision stated that "[n]o class actions or joinder or consolidation of claims with other persons, are permitted without the consent of the parties hereto." Pet. App. 17a. Subsections C and D specifically address the limitation on seeking relief through a class action if arbitration is invoked. Subsection C provides in part:

> I ACKNOWLEDGE THAT I WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION, EVEN IF SUCH CLASS ACTION IS PENDING ON THE EFFECTIVE DATE OF THE ARBITRATION PROVISION, EXCEPT THAT THIS ARBITRATION PROVISION WILL NOT PRECLUDE MY PARTICIPATING IN A CLASS WHICH HAS ALREADY BEEN CERTIFIED ON THE EFFECTIVE DATE OF THIS ARBITRATION PROVISION.

Pet. App. 18a-19a (capitalization in original). Subsection D contains an additional disclaimer that the customer acknowledges that he or she "may be giving up [his or her] right to participate as a member of such class [challenging the RAL program but not yet certified]." Pet. App. 19a.

2. On December 5, 2003, petitioners moved to dismiss the First Amended Complaint and compel arbitration pursuant to the FAA. Respondents argued that the Arbitration Provision was unconscionable as a matter of West Virginia law and that the state court should decide that issue for itself. Petitioners responded, in turn, that the Provision was indeed enforceable pursuant to the FAA, which preempts any state law to the contrary, and also that the arbitrator should actually decide the question of unconscionability, because the Arbitration Provision encompassed disputes related to the "validity [and] enforceability" of the Provision.

The court denied the motion to compel arbitration orally at a hearing on March 18, 2004, and a written order was filed on June 1, 2004. In its order, the court first summarily rejected petitioners' argument that under the Arbitration Provision, an arbitrator, rather than the court, should decide whether the Provision was unconscionable, stating simply that "[t]he issue of whether a contract or provision is unconscionable 'is an equitable principle and . . . should be made by the Court.'" Pet. App. 7a-8a. The court cited one case, *Troy Mining Corp. v. Itmann Coal Co.*, 346 S.E.2d 749 (W. Va. 1986), which dealt with whether unconscionability should be decided by a judge or a jury. The court then held that the Arbitration Provision was unconscionable based on two findings. First, the court found that the contractual offset rights were one-sided and (contrary to the plain language of the Provision) that petitioners could somehow pursue these offset remedies in court, and therefore that the Provision

contained non-mutual provisions allowing one party greater access to the courts than the other. Pet. App. 7a, 11a-12a. The court reasoned that this made the Provision unconscionable under the West Virginia Supreme Court of Appeals decision in *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998).

Second, the court found that the terms in the Provision limiting class action relief were unconscionable under the West Virginia Supreme Court of Appeals decision in *Dunlap* because petitioners could effectively prevent recourse to a class action by invoking arbitration. The court found that "the arbitration provisions contained in the RAL applications allow the Defendants to force potential plaintiffs into arbitration, unless the plaintiffs bring their claims in small claims court," Pet. App. 6a-7a, and that "[t]he effect of [the Provision] is that the Defendants are not subject to a class action suit unless they so desire." Pet. App. 7a. Reasoning that "as with many class action claims, the Defendants' ability to force arbitration effectively results in the inability of many plaintiffs to pursue their claims due to costs," the court concluded that "[h]inging the plaintiff's rights to class action relief upon the Defendants' preferences is contrary to the intent of assuring West Virginia customers the class action relief." Pet. App. 12a-13a. Thus, the court found the Provision unconscionable and refused to enforce it. Finally, the court denied a request to sever the unconscionable portions of the arbitration agreement and enforce the rest. Pet App. 14a.

Petitioners filed a timely petition for a writ of prohibition in the West Virginia Supreme Court of Appeals, arguing that the trial court's holding was flawed as a matter of law under state law and the FAA.[1] Respondents opposed the petition,

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[1] There is no requirement in West Virginia that the Supreme Court of Appeals hear interlocutory appeals from denials of motions to compel

relying heavily on the Supreme Court of Appeals' holding in *Dunlap* that arbitration provisions limiting class action relief are unconscionable. On September 2, 2004, the Supreme Court of Appeals denied the petition for a writ of prohibition, thus exhausting petitioners' potential remedies in state court.[2] Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

This case raises important and recurring issues relating to the duty of all state and federal courts to enforce agreements to arbitrate disputes, particularly disputes involving claims that might be brought as a class action if filed in court. First, it is time for the Court to decide whether language in an arbitration agreement specifying that disputes must be litigated individually rather than on a class basis can provide a justification, consistent with the FAA, for a refusal to enforce the arbitration agreement itself. Over a decade ago, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court strongly suggested that parties entering into an arbitration agreement may validly agree that their disputes in arbitration will not be heard on a class basis, reasoning that

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arbitration, and instead the court chooses to evaluate such rulings on a discretionary basis pursuant to writs of prohibition. The Supreme Court of Appeals has held that § 16 of the FAA, which does provide for such appeals in federal court, does not preempt West Virginia's appellate procedure and thus does not require mandatory appellate jurisdiction in state courts of orders denying arbitration. *See Dunlap*, 567 S.E.2d at 271.

[2] Subsequent to the trial court's order under review, respondents filed a Second Amended Complaint naming two additional Block entities. On the basis of the allegations against the new entities, petitioners and the new Block entities filed a notice of removal. The federal district court is currently considering whether to remand the case to state court, and thus the case may be in either state or federal court at the time that briefing on the Petition is complete. Nevertheless, the removal does not affect this Court's jurisdiction to review the final judgment of the state court under § 1257(a).

class actions are merely a procedural device that may be waived without justifying a refusal to enforce the arbitration agreement itself. But the West Virginia Circuit Court, following the rule in that State, held that the prohibition on seeking class action relief in the arbitration clause of a form contract rendered the arbitration clause unenforceable on grounds of unconscionability.

There is a huge split of authority from around the country about whether the FAA permits or preempts such a state law rule limiting the ability of contracting parties to agree to send their disputes to individual hearings in arbitration. And there are several reasons why this Court should resolve that inconsistency as soon as possible. To begin, it is highly doubtful that the FAA does allow a state to void all arbitration agreements in consumer contracts waiving class actions. After all, such a rule means that the policies of the FAA will be generally disregarded in the context of consumer contracts, because almost any complaint involving such contracts can be brought as a class action.

Moreover, the need for review on this question is especially compelling because the deck is stacked against defendants seeking to enforce arbitration clauses barring class actions. They can win in dozens of jurisdictions, requiring potential class action plaintiffs to arbitrate their individual claims, but eventually some plaintiff will appear in a jurisdiction with the opposite rule and the defendant will find itself facing a statewide or possibly a nationwide class action. Once that occurs, the arbitration agreements signed by all of the class members are rendered a nullity – a result that hardly seems consistent with the letter and spirit of the FAA.

The second important question presented here is whether a court, rather than arbitration, is the proper forum for deciding questions of enforceability, including substantive

unconscionability, especially when a clause in the arbitration agreement specifically provides that an arbitrator should decide questions of the validity and enforceability of the arbitration agreement. Although the West Virginia courts' rule regarding the unconscionability of class action waivers requires the Court's direct review to correct, it is not clear that questions of an arbitration agreement's enforceability should be decided by a court in the first instance going forward. In this case, the court's insistence that it – not the arbitrator – was the proper forum to hear an unconscionability challenge to the arbitration agreement was especially problematic. For one thing, it defied the express language of the arbitration agreement itself, which stated that the arbitrator should decide questions about the validity and enforceability of the agreement to arbitrate. The Court has repeatedly held that contractual parties may validly agree to arbitrate questions about whether a given dispute falls within the scope of an arbitration clause – *i.e.*, to "arbitrate arbitrability" – even though that issue would otherwise fall within the authority of the court. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986). It has not said whether parties may also properly agree to arbitrate the validity and enforceability of an arbitration agreement that, on its face, applies to a given dispute. But there is every reason to think that such a rule should follow from the Court's precedents.

Indeed, although many courts do address questions of unconscionability and other public policy challenges to arbitration agreements before sending cases to arbitration, this Court's decisions in recent years are moving toward the conclusion that once a dispute is within the substantive scope of an arbitration agreement in a contract, all challenges to the enforcement of the agreement to arbitrate based on the procedures that are provided, the fees that are demanded, or

the remedies that are available in arbitration should be addressed first to the arbitrator. This case would provide a welcome opportunity to clarify that, under the FAA, such substantive enforceability challenges must be arbitrated, at least when the parties so specified as in this case, and possibly even when they did not.

I. THE WEST VIRGINIA CIRCUIT COURT ERRED IN HOLDING THAT ARBITRATION PROVISIONS LIMITING THE USE OF CLASS ACTIONS ARE UNCONSCIONABLE.

The Circuit Court's holding that a prohibition on class actions constituted independent grounds for refusing to enforce the Arbitration Provision merits this Court's review. Citing the prevailing rule in West Virginia established in *Dunlap*, the court held that any prohibition on class actions in an arbitration clause in a form contract is unconscionable. Such a rule is difficult to square with this Court's suggestion in *Gilmer* that waivers of procedural remedies like class actions in arbitration clauses should be respected under § 2 of the FAA. The rule, while accepted by some other courts outside West Virginia, also conflicts directly with decisions by many other courts. There is a clear need for resolution of these issues to establish uniform national standards, consistent with the FAA.

1. The case upon which the Circuit Court based its holding, *State ex rel. Dunlap v. Berger*, is flawed in its approach to arbitration of class actions, yet it typifies the reasoning employed by other courts that have held arbitration agreements prohibiting class actions to be unconscionable. In *Dunlap*, the Supreme Court of Appeals reasoned that a limitation on use of class actions worked to the detriment of consumers, who were deprived of a substantive right to relief. The court noted that "[c]lass action relief – including the remedies of damages, rescission, restitution, penalties,

and injunction – is often at the core of the effective prosecution of consumer, employment, housing, environmental, and similar cases." 567 S.E.2d at 278. Further, the court reasoned that class actions "'correct[] wrongs committed by large-scale enterprise upon individual consumers,'" *id.* (quoting *McFoy v. Amerigas, Inc.*, 295 S.E.2d 16, 24 (W. Va. 1982)), and that their effectiveness is heightened in cases where consumers have small claims which can be aggregated:

> [T]he total of $8.46 [at issue] is precisely the sort of small-dollar/high-volume (alleged) illegality that class action claims and remedies are effective at addressing. In many cases, the availability of class action relief is a *sine qua non* to permit the adequate vindication of consumer rights.

Id. Thus, in the case of a contract of adhesion, "a provision that prevents an aggrieved party from pursuing class action relief would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable." *Id.* at 278-79. Citing a line of prior cases, the *Dunlap* court identified and relied on a principle of West Virginia law that "exculpatory" provisions in form contracts are unconscionable and applied that rule to the class-action ban.

The Supreme Court of Appeals found the FAA to be inapplicable because the court was purporting to apply general contract principles, not principles discriminating against arbitration in particular. The court rejected the argument that the FAA prevented this application of the unconscionability doctrine. It explained that the FAA allows rejection of arbitration agreements based on grounds that state law would apply to any contract. *Id.* at 272 n.3 (citing 9 U.S.C. § 2 and *Doctors' Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). It also derived from this Court's prior

cases the principle that an arbitration agreement is enforceable under the FAA only when it permits parties "to fully and effectively vindicate their rights." *Id.*; *see id.* at 281 (citing *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000)). In the *Dunlap* court's view, the only way to enable consumers with very small claims to vindicate their rights is to allow aggregation of those claims in a class action.

Reasoning similar to that in *Dunlap* has led other courts around the country to hold that arbitration provisions limiting class actions are unconscionable. In *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (Ct. App. 2002), *cert. denied*, 537 U.S. 1226 (2003), the Court of Appeals of California held such provisions to be substantively unconscionable because the court thought the class action procedure necessary to vindicate rights under the statute in general, if not the particular rights of the named plaintiff:

> It is the *manner* of arbitration, specifically, prohibiting class or representative actions, we take exception to here. The clause is not only harsh and unfair to [the defendant's] customers who might be owed a relatively small sum of money, but it also serves as a disincentive [to the defendant] to avoid the type of conduct that might lead to class action litigation in the first place. . . . [The defendant] has essentially granted itself a license to push the boundaries of good business practice to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies. . . . Therefore, the provision violates fundamental notions of fairness.

Id. The Ninth Circuit has followed the lead of California courts as well in refusing to enforce arbitration agreements that prohibit class actions. *See Ingle v. Circuit City Stores*,

Inc., 328 F.3d 1165, 1175-76 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1169 (2004).

This type of free-wheeling, policy-driven analysis animates other decisions finding bans on class actions to be unconscionable. *See Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999) ("Class litigation provides the most economically feasible remedy for the kind of claim that has been asserted here. . . . By requiring arbitration of all claims, Powertel has precluded the possibility that a group of its customers might join together to seek relief that would be impractical for any of them to obtain alone."); *Leonard v. Terminix Int'l Co. L.P.*, 854 So. 2d 529, 539 (Ala. 2002) (provision unconscionable in part because it "foreclos[es] the [plaintiffs] from an attempt to seek practical redress through a class action and restrict[s] them to a disproportionately expensive individual arbitration"); *Luna v. Household Finance Corp.*, 236 F. Supp. 2d 1166, 1179 (W.D. Wash. 2002) (provision's "prohibition of class actions is likely to bar [class] actions involving practices applicable to all potential class members, but for which an individual customer has so little at stake that she is unlikely to pursue her claim"); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1104-05 (W.D. Mich. 2000).

By contrast, these arguments against class action waivers have been rejected by many other courts, which have held instead that class actions are simply procedural mechanisms that can waived by a valid arbitration agreement under the FAA. For example, the Court of Appeals of Texas, expressly rejecting the argument that enforcing arbitration provisions will "encourage[] [businesses] to engage in illegal conduct because they will not have to be concerned about class actions," replied that:

> This assumes that the right to proceed on a class-wide basis supersedes a contracting party's right to arbitrate under the FAA. However, the primary purpose of the FAA is to overcome courts' refusals to enforce agreements to arbitrate and to ensure that private agreements to arbitrate are enforced according to their terms. . . . [T]here is no entitlement to proceed as a class action.

AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 199-200 (Tex. App. - Houston [14th Dist.] 2003, no writ).

Other courts are in accord. *See Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448, 449 (App. Div. 2003) ("[G]iven the strong public policy favoring arbitration, . . . and the absence of a commensurate policy favoring class actions, we are in accord with authorities holding that a contractual proscription against class actions . . . is neither unconscionable nor violative of public policy . . . ."); *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566, 573 (E.D. La. 2002); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001); *Gras v. Associates First Capital Corp.*, 786 A.2d 886, 892-93 (N.J. Super. Ct. App. Div. 2001).

In addition, several other courts evaluating whether arbitration provisions may waive class actions in cases brought under the federal Truth in Lending Act – a statute that specifically anticipates enforcement through class actions – have concluded that the FAA's pro-arbitration policy should prevail. *See, e.g., Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000); *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 818-19 (11th Cir. 2001); *see also Champ v. Siegel Trading Co.*, 55 F.3d 269, 276 (7th Cir. 1995) (possibility of pursuing class action is a "procedural nicet[y]" which can be waived by agreement to arbitrate).

Finally, *this very arbitration provision* has repeatedly been upheld (often in unpublished decisions) against a challenge to its enforceability, including its prohibition on class actions. *See, e.g.*, *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903 (7th Cir. 2004) (rejecting broad challenge to enforceability of this RAL arbitration clause). As one district court in Illinois put it in granting a motion to compel arbitration, "[n]othing prevents the Plaintiffs from contracting away their right to a class action." *Zawikowski v. Beneficial Nat'l Bank*, No. 98-C-2178, 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999).

2. There are good reasons to think the uniform pro-arbitration policy embodied in § 2 of the FAA preempts any West Virginia law refusing to enforce arbitration provisions that restrict recourse to class actions. This Court itself strongly suggested that arbitration provisions limiting class actions are generally enforceable under the pro-arbitration policy of the FAA in *Gilmer*. The Court there held that an arbitration provision requiring arbitration of claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* was enforceable. One challenge to the arbitration provision was that, as a procedural matter, arbitration did not allow for the maintenance of class actions. The Court rejected the challenge succinctly, quoting Judge Becker's observation that "'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" *Gilmer*, 500 U.S. at 32 (quoting *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)). In other words, the fact that a particular statute allows enforcement through a class action does not mean that the plaintiff may not waive that procedural device in choosing a forum in which to adjudicate disputes.

Regardless of whether the Court in *Gilmer* squarely held that arbitration provisions limiting class actions are always enforceable, the Court quite clearly held that a class action was a procedural device, not a substantive right, which could validly be waived even if the option was established specifically in the governing statute. *Cf. Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) (in federal court, "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims").

Further, *Dunlap* and the Circuit Court's decision in this case run afoul of this Court's established doctrine under the FAA in that they demonstrate a clear preference for a judicial procedural device at the deliberate expense of arbitration. Arbitration, of course, is just a forum, and parties should be free to choose arbitration, and concomitant procedural rules within arbitration, under the terms of the FAA. As the Seventh Circuit recognized in disposing of unconscionability arguments against an arbitration provision essentially the same as this one:

> Is enforcement of this clause unconscionable? How could it be? Arbitration is just a forum; people may choose freely which forum will resolve their dispute.

Carbajal v. H&R Block Tax Servs., Inc., 372 F.3d at 905-06. Indeed, as the *Carbajal* court added, "people are free to opt for bargain-basement adjudication" and that remains true even if the choice includes a waiver of rights, because "no general doctrine of federal law prevents people from waiving statutory rights (whether substantive or procedural) in exchange for other things they value more, such as lower prices or reduced disputation." *Id.* at 906-07.

The policy preference for a certain procedure, whether or not couched in terms of "unconscionability," is simply a device to ensure preference of the judicial forum over the arbitral forum. This the FAA does not allow. *See Doctor's*

Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603, 615-16 (S.D. W. Va. 2004) (criticizing *Dunlap* as favoring judicial procedural rules at the expense of arbitration). Indeed, most West Virginia plaintiffs in consumer cases *can now simply plead a class action* to extract themselves from arbitration agreements that might limit class relief. This hardly vindicates the "liberal federal policy favoring arbitration agreements" embodied in the FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). As the Seventh Circuit put it, arguments that arbitration clauses are unenforceable based on the unavailability of class actions are "the sort of litany that the federal Arbitration Act is supposed to silence." *Metro East Center for Conditioning & Health v. Qwest Communications Int'l, Inc.*, 294 F.3d 924, 927 (7th Cir. 2002), *cert. denied*, 537 U.S. 1090 (2002).

The Court should review the judgment of the Circuit Court to resolve this critical question.

II. THE WEST VIRGINIA CIRCUIT COURT ERRONEOUSLY USURPED THE ROLE OF THE ARBITRATOR BY DETERMINING THAT THE ARBITRATION AGREEMENT WAS UNCONSCIONABLE.

In addition to reviewing the propriety of the Circuit Court's decision on the class action question, the Court should grant review to determine whether a court or an arbitrator is the appropriate forum going forward for making determinations about unconscionability questions, an issue which is itself important, recurring, and unresolved by the Court. The Arbitration Provision here contains standard language providing that questions about the "validity [and] enforceability" of the Arbitration Provision itself must be resolved by the arbitrator. Yet in this case, the Circuit Court

bypassed this language, simply declared that the issue was one for the courts to decide, and usurped the arbitrator's role by deciding the enforceability issue itself. That approach is troubling because it simply negated a term of the arbitration agreement in favor of blanket judicial resolution of enforceability issues that should properly be decided by an arbitrator. While the Court has not definitively ruled on this issue, the clear trend of recent arbitration cases suggests that arbitrators, not courts, should consider substantive enforceability challenges, particularly when the arbitration clause so specifies and arguably even in cases without such explicit provisions.[3]

First, as already noted, the Court has held that a dispute about whether a given claim is covered under an arbitration agreement normally falls within the bailiwick of the court, *unless* the arbitration agreement clearly and unmistakably specifies otherwise. *See First Options*, 514 U.S. at 943-45; *AT&T Techs.*, 475 U.S. at 649. When the parties clearly agree to "arbitrate arbitrability," the question of the scope of the arbitration agreement should go to the arbitrator in the first instance. A provision clearly indicating that the parties

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[3] It is still necessary for the Court to review the Circuit Court's holding on class actions before reaching the question whether remaining enforceability issues should be sent to the court or arbitrator for resolution. If the Court were to remand to arbitration without deciding the class action question, the arbitrator would still be duty-bound to apply West Virginia's flawed holding in *Dunlap* that prohibitions on class actions in arbitration agreements are unconscionable, notwithstanding the mandates of the FAA. Thus, the correctness of the *Dunlap* holding is an integral issue in resolving this case in *any* forum. Indeed, a remand to the arbitrator without reviewing *Dunlap* would simply freeze the law in this area, essentially making *Dunlap* unreviewable by removing any arguments against the merits of the decision from the judicial process. In this regard, the Court should resolve this case much the same as in *Randolph*, where the Court overturned the lower court's legal holding regarding enforceability and then remanded to compel arbitration.

should arbitrate "enforceability," to the extent that it includes substantive rather than procedural challenges to enforceability, is really no different.[4] Agreeing to arbitrate enforceability is no different than agreeing to arbitrate the merits of a dispute in that arbitration is "simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943.

Further, the Court has increasingly moved in the direction of holding that disputes about whether aspects of the arbitration provision should be enforced should be raised to the arbitrator in the first instance. For example, the Court has held that complaints about the adequacy of the relief that the arbitrator might award should not be raised in advance, at least if there is some uncertainty about the arbitration language or relief available. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003). As the Court emphasized in *PacifiCare*, in a challenge that an arbitration clause was not enforceable due to possible limits on treble damages as remedies, the proper course is to

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[4] There is a good argument that challenges relating to whether the arbitration clause was validly agreed to ought to be considered by the court. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (claim of fraudulent inducement of entire contract must be arbitrated, although court could properly consider claim that arbitration clause specifically was fraudulently induced). Therefore, a distinction should be drawn between challenges based on the substantive unconscionability of an arbitration clause (as here) and those involving what is sometimes called "procedural unconscionability" – arguments that the consumer never had meaningful notice of the arbitration agreement.

compel arbitration and let the arbitrator sort out the issues relating to enforceability. 538 U.S. at 407.[5]

The Court has also narrowed in other ways those categories of disputes about arbitration provisions that are considered appropriate for courts to resolve in advance. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the Court rebuffed an effort to enlarge the role of courts in addressing "arbitrability" to include a determination about whether a claim was timely filed. It drew a distinction between the question whether a given dispute falls within an arbitration agreement and other procedural issues like timeliness and waiver that go first to the arbitrator. *Id.* at 84-85. And in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the Court held that a dispute over whether the unclear language of an arbitration agreement allowed *class* arbitration should be resolved by the arbitrator, not a court. It reasoned that the issue involved what *kind* of arbitration the parties had agreed to, not the narrow issue of whether a particular dispute is or is not arbitrable, which is presumptively for courts to decide.

This case presents the logical next question: who decides whether enforcement of the arbitration agreement would be unconscionable or violate public policy? There are different possible answers to this question. Some courts, building on

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[5] In *Green Tree Financial Corp.-Alabama v. Randolph*, the Court itself overturned a legally flawed lower court ruling that refused to enforce an arbitration agreement based on excessive costs. While review of the erroneous legal holding was necessary to resolve the case, the parties did not address whether, in the future, such disputes about excessive costs may be directed to the arbitrator in the first instance. Given that concerns about the arbitrator's treatment of fees and costs are just as speculative as the concerns about adequate relief identified in *PacifiCare*, it would be a logical next step to send those disputes to an arbitrator to resolve as well, though it was not necessary to decide this issue in *Randolph*, nor was it presented.

the line of cases just summarized, hold that once a given claim is determined to be covered by an arbitration agreement, all arguments about unconscionability or public policy arising from concerns about costs or the inadequacy of relief available in arbitration must be directed first to the decisionmaker specified by the parties – the arbitrator. *See Carbajal*, 372 F.3d at 906 (rejecting effort to avoid arbitration based on absence of potential for statutory fee award; "the arbitrator rather than the court determines the validity of these ancillary provisions") (citing *PacifiCare*); *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 726-27 (8th Cir. 2003) (unconscionability challenge to arbitration provision providing that prevailing party would recover costs and expenses "was properly presented to the arbitrator and not the District Court"), *cert. denied*, 124 S. Ct. 1147 (2004); *Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255, 1258-62 (11th Cir. 2003) (arbitrator, not court, should decide whether "loser pays" provision in Title VII case undermines statutory remedy); *Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88, 92 (1st Cir. 2002) (argument that "loser pays" provision deprived party of statutory right and conflicted with statute's remedial goals must be presented to arbitrator); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 232 (3d Cir. 1997) (argument against arbitration premised on plaintiff's prospective inability to collect statutory punitive damages "is separate and apart from the issue of whether an employee has agreed to an arbitral forum, and hence, is for the arbitrator to decide").

Others reject this position and address for themselves arguments regarding the enforceability of a provision challenged as unconscionable or against public policy. *See Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 316 (5th Cir. 2002) (noting that "circuit courts are split on whether the enforceability of an arbitration clause

should be adjudicated before arbitration when a party contends that public policy prevents the clause's waiver of certain remedies" and concluding that the court should decide); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002) (holding that fee-splitting and remedy limitation provisions made arbitration agreement substantively unconscionable); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248 (9th Cir. 1994) (holding that limitation of remedy provisions rendered arbitration clause unenforceable).

Then there is the third and least plausible position, reflected in the ruling of the Circuit Court in this case, that unconscionability is always a matter for the court to decide *even if the parties have specified otherwise in the contract.* A rule that challenges to the enforceability and validity of an arbitration agreement can never be validly assigned by agreement to the arbitrator makes little sense in light of the holding in *First Options* that parties *can* validly agree to arbitrate disputes over the scope of the arbitration agreement.

There is good reason to be concerned about courts running roughshod over such provisions. In this case itself, the court piled onto its class action holding and blatantly misconstrued a section of the Arbitration Provision dealing with contractual offset rights in order to find the Arbitration Provision unconscionable. The clause in question preserves a common self-help remedy, the right of the lending bank to offset a customer's overdue amounts owing on prior RALs or other bank debts against payout on a pending RAL. This is a process requiring no judicial action that makes perfect sense when a customer has asked for a "refund anticipation loan." The Circuit Court misconstrued this clause and a clause outside the arbitration agreement relating to payment of court costs to hold erroneously that petitioners had preserved some judicial options for themselves while denying them to its

customers, which it found unconscionable under West Virginia law.[6] While this holding is clearly in error, what is more disconcerting is that the Circuit Court casually cast aside the section of the Arbitration Provision providing that such questions regarding "validity [and] enforceability" are to be sent to the arbitrator. Regardless of the merits, there is simply no reason why the court, not the arbitrator, should be interpreting the contract in order to make this enforceability determination.[7]

The Court should take this opportunity to make clear that the West Virginia courts have gone too far by maintaining monopoly power to address unconscionability challenges even if the contract provides otherwise. Potential defendants, after all, have good reason to think that it is more sensible for these kinds of concerns to be addressed in arbitration in the first instance. In most if not all cases, the fairness arguments that underlie substantive unconscionability arguments are

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[6] The offset provision, of course, does not involve recourse to either a court or arbitrator at all. And the Arbitration Provision explicitly provides that *either party* can invoke arbitration as to *any* dispute, except one filed in small claims court by the customer (which "favors" the customer, not H&R Block). The clause outside the Arbitration Provision, stating that the customer is liable for attorneys' fees and court costs incurred to collect delinquent debts or unpaid fees, gives H&R Block no independent basis for filing a court action that could not be removed to arbitration at the discretion of the customer – which the customer would clearly be able to do under the plain language of the Arbitration Provision.

[7] The Court could properly vacate the Circuit Court's interpretation of the contract holding the offset provision to be unconscionable, as the arbitrator should be allowed to make this contract-specific determination in the first instance. The resolution of this issue is no different than the disposition in *Bazzle*, where the Court left it to the arbitrator in the first instance to interpret disputed contract language, notwithstanding the state court ruling interpreting the same language.

somewhat speculative, and the arbitrator, if presented with the arguments, might decide to solve the problem – whether it be excessive fees or a limitation on damages or even a waiver of class actions – while keeping the case in arbitration. Or, as it should in this case, the arbitrator might decide that there is no enforceability problem at all. But as long as courts are free to breeze by clauses assigning disputes over enforceability to an arbitrator in order to address these kinds of fairness arguments themselves, they will have a potent weapon and a proven inclination to avoid their duty under the FAA to enforce agreements to arbitrate such disputes. This case provides an excellent illustration of that problem, and the Court should grant review to address it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1, 2004

APPENDICES

APPENDIX A

STATE OF WEST VIRIGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd of September, 2004, the following order was made and entered:

State of West Virginia ex rel. H&R Block, Inc.; H&R Block Tax Services, Inc.; H&R Block Eastern Tax Services, Inc.; Melanie Lester; Jason Brown; Bobby Hague; Robert Heckert; Cynthia Lantz; Clarence E. Miller; Carla R. Lewis; Debra Riggleman; and John Doe, Petitioners

vs.) No 041119

The Honorable Louis H. Bloom, Judge of the Circuit Court of Kanawha County; Deadra R. Cummins, on her own behalf and on behalf of those similarly situated; and Ivan and LaDonna Bell, on their own behalf and on behalf of those similarly situated, Respondents

On a former day, to-wit, June 22, 2004, came the petitioners, H&R Block, Inc, et al., by Ancil G. Ramsey and Hannah B. Curry, Steptoe & Johnson, PLLC; and N. Louise Ellingsworth and Michael D. Pospisil, Bryan Cave LLP, their attorneys, and presented to the Court their petition praying for a writ of prohibition to be directed against the respondents, Honorable Louis H. Bloom, Judge of the Circuit Court of Kanawha County, Deadra R. Cummins, and Ivan and LaDonna Bell, as therein set forth. Thereafter, on the 29th day of July, 2004, pursuant to a request for a response under Rule 14(b) of the Rules of Appellate Procedure, came

the respondents, Deadra Cummins and Ivan and LaDonna Bell, by Brian A. Glasser, H.F. Salsbery, Eric B. Snyder and Deidre H. Purdy, Bailey & Glasser, LLP, their attorneys, and presented to the Court their initial response thereto.

Upon consideration whereof, the Court is of the opinion that a rule should not issue. It is hereby ordered that the petition for writ of prohibition prayed for by the petitioners is hereby refused.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

APPENDIX B

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

DEADRA D. CUMMINS, on her own behalf and on behalf of those similarly situated, and IVAN and LaDONNA BELL, on their own behalf and on behalf of those similarly situated, Plaintiffs,

v.

H&R BLOCK, INC., H&R BLOCK TAX SERVICES, INC., H&R BLOCK EASTERN TAX SERVICES, INC., MELANIE LESTER, JASON BROWN, BOBBY HAGUE, ROBERT HECKERT, CYNTHIA LANTZ, CLARENCE E. MILLER, CARLA R. LEWIS, DEBRA RIGGLEMAN and JOHN DOE, Defendants,

Civil Action No. 03-C-134
(Judge Louis H. Bloom)

ORDER DENYING SERVED DEFENDANTS' MOTION TO COMPEL ARBITRATION, ORAL MOTION TO SEVER ARBITRATION PROVISION, AND ORAL MOTION TO STAY PROCEEDINGS PENDING APPEAL

On the 18th day of March 2004, pursuant to notice, the parties appeared, by counsel, for the continuation of the December 11, 2003 hearing on "The Served Defendants' Motion to Dismiss and to Compel Arbitration" (hereinafter "Defendants' Motion"). At the March 18th hearing, the defendants' counsel also orally moved to sever the arbitration provision, and defendants' counsel also moved for a stay pending an appeal of this Court's ruling on these issues.

The Court considered the Defendants' Motion seeking to compel. arbitration based on the arbitration provision

contained in the Refund Anticipation Loan (hereinafter "RAL") application documents. After reviewing the various pleadings, exhibits, pertinent case law, and arguments of counsel made on December 11, 2003 and March 18, 2004, the Court denies Defendants' Motion to compel arbitration, denies the defendants' subsequent oral motion to sever the arbitration provision, and denies the defendants' oral motion for a stay pending appeal of this Court's ruling on the above-mentioned issues. These rulings are based on the following:

FINDINGS OF FACT

1. Defendants H & R Block, Inc, H & R Block Tax Services, Inc., H & R Block Eastern Tax Services, Inc., Robert Heckert, Cynthia Lantz, Clarence E. Miller, Carla R. Lewis, and Debra Riggleman (hereinafter collectively referred to as "Defendants"), on a previous day, filed "The Served Defendants' Motion to Dismiss and to Compel Arbitration."

2. Defendants' Motion asks this Court to dismiss this action and compel arbitration according to the arbitration provisions contained in RAL applications, which were signed by the Plaintiffs. The Defendants claim that the arbitration provision is governed by the Federal Arbitration Act. 9 U.S.C. § 1, et seq.

3. The Plaintiffs thereafter filed "Plaintiffs' Response to Defendants' Motion to Dismiss" on October 14, 2003, which asks this Court to find that the arbitration provisions contained in the RAL documents are unenforceable because certain provisions are unconscionable under West Virginia law.

4. The Plaintiffs claim that certain provisions of the arbitration agreement severely restrict the Plaintiffs' access to a judicial forum, but have absolutely no effect on the Defendants' rights. Plaintiffs claim that the Supreme Court

of Appeals of West Virginia held that provisions similar to the ones at hand were unenforceable as unconscionable. *See State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567. S.E.2d 265 (W. Va. 2002); *Arnold v. United Companies Lending Corp.*, 204 W. Va. 229, 511 S.E.2d 854 (W. Va. 1998).

5. The RAL Applications from 1996 forward, but within the putative class period, contained language substantially similar to that contained in the RAL documents for the Plaintiffs in 2002, a copy of which was submitted at this hearing, and which contained the following language:

> "HB hereby agrees not to invoke its right to arbitrate an individual claim I may bring in small claims court or an equivalent court, if any, so long as the claim is pending only in that court. No class actions or joinder or consolidation of claims with other persons, are permitted without consent of the parties hereto".
>
> * * *
>
> "Nothing in this Arbitration Provision shall be construed to prevent HB's use of offset or other contractual rights involving payment of my income tax refund or other amount on deposit with HB to pay off any RAL debts or ERO or other fees now or hereafter owed by me to HB or any other RAL Lender or ERO or third party pursuant to the Documents or similar prior documents"; and
>
> "Unless a class has been or is certified in one or more of these lawsuits prior to the effective date of this Arbitration Provision and the certification has not been overturned, I acknowledge that by signing the Documents, I may be giving up my right to participate as a member of such class if HB decides to arbitrate such a claim. This means I may not be able to obtain financial or other benefits which might

ultimately be paid to or conferred upon members of the class".

6. The Plaintiffs also contend that the arbitration provisions constitute adhesion contracts which contain unconscionable terms, thus making the provisions unenforceable.

7. The Plaintiffs' underlying complaint contains, among others, a claim asserted under the West Virginia Consumer Credit and Protection Act (hereinafter "WVCCPA") found in West Virginia Code, section 46A-6C-l et seq. The Plaintiffs contend that the arbitration provisions violate the WVCCPA and specifically that the Defendant's, by presenting the RAL application to the plaintiffs, caused consumers and buyers of services to waive certain rights in violation of West Virginia Code, section 46A-6C-8. Plaintiffs argue that because the arbitration provisions result in the Plaintiffs waiving certain rights, the provisions are void under the same statute.

8. The Defendants claim that they are not a "credit service organization" as they did not obtain an extension of credit but only transmitted the Plaintiffs' RAL application to the lending institutions. Therefore, the Defendants claim that they are not subject to the WVCCPA.

9. The Plaintiffs counter by alleging that because the Defendants negotiated and arranged the RAL's, it acted as a broker, and thus is subject to the WVCCPA.

10. It is clear from the facts that the Defendants were responsible for presenting the RAL application to the Plaintiffs and then transferring that application to the lending institution.

11. Based on the evidence presented, this Court finds as fact that the arbitration provisions contained in the RAL applications allow the Defendants to force potential plaintiffs

into arbitration, unless the plaintiffs bring their claims in small claims court.

12. This Court additionally finds as fact that the arbitration provisions preclude any plaintiff from pursuing any class action claims he or she may have against the Defendants, or joining any other plaintiff in claims against the Defendants. If the situation arose whereby the Defendants desired that plaintiffs' claims be joined, the Defendants could allow such joinder, if neither party forced arbitration. The effect of this is that the Defendants are not subject to a class action suit unless they so desire.

13. Furthermore, this Court finds as fact that the arbitration provisions do not prevent the Defendants from pursuing certain claims against plaintiffs, even if plaintiffs desire to have such claims subject to arbitration. Specifically, the Defendants can seek a judicial forum, over plaintiffs' objections, for matters relating to collection or, other contractual rights involving payment of the plaintiffs' tax refunds or other amounts on deposit with the Defendants. However, if plaintiffs wanted to pursue similar actions, the Defendants have the ability, under the arbitration provisions, to force the plaintiffs into arbitration.

14. The arbitration provisions at issue in this case state that "[e]ach party shall bear the expense of their respective attorney's fees, regardless of which party prevails" and if the Defendants pursue claims relating to collection or other contractual rights, the plaintiffs are responsible for the attorney's fees, collection agency fees, and court costs incurred by the Defendants in pursuing such actions.

DISCUSSION OF THE LAW

1. In resolving this motion, this Court must apply general contract law principles relating to the revocation or enforcement of any contract, not just one for arbitration. The

issue of whether a contract or provision is unconscionable "is an equitable principle and. . . should be made by the Court." Syllabus pt. 1, *Troy Min. Corp. v. Itmann Coal Co.*, 176 W. Va. 599, 346 S.E. 2d 749 (1986).

Federal Arbitration Act implications

2. The Federal Arbitration Act (hereinafter "FAA") establishes a national policy which favors arbitration, however, the FAA provides that contracts to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract". 9 U.S.C.A. § 2.

3. The Supreme Court of Appeals of West Virginia (hereinafter "WVSCA") held that the Federal Arbitration Act allows "pre-dispute agreements to use arbitration as an alternative to litigation in court . . . only when arbitration . . . [allows] a party to fully and effectively vindicate their rights." *State ex rel. Dunlap v. Berger*, 211 W. Va. 556, n.3, 567 S.E.2d at 273 n.3.

4. The WVSCA also cited a United States Supreme Court decision in stating that the existence of a large arbitration cost can preclude a litigant from vindicating rights. *Id* at 565, 567 S.E. 2d at 281, citing *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90, 121 S. Ct. 513, 522, 148 L. Ed. 2d 373, 383 (2000).

West Virginia Consumer Credit and Protection Act

5. The WVCCPA describes a credit services organization as:

> "a person who, with respect to the extension of credit by others and in return for the payment of money or other valuable consideration, provides, or represents that the person can or will provide any of the following services: (1) Improving a buyer's credit

record, history or rating; (2) Obtaining an extension of credit for a buyer; or (3) Providing advice or assistance to a buyer with regard to subdivision (1) or (2) of this subsection."

W. Va. Code, § 46A-6C-2(a).

6. Under the West Virginia Consumer Credit and Protection Act, credit services organizations are prohibited from causing a buyer to waive a right under Article 46A of the West Virginia Code, and such waiver by a buyer is void. W. Va. Code § 46A-6C-8.

7. The WVCCPA states that: "With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan" a Court can refuse to enforce an agreement or parts of an agreement which the Court finds, as a matter of law, are unconscionable. W. Va. Code, § 46A-2-121.

Unconscionable Provisions

8. The WVSCA previously decided a case in which a lending company's loan agreement contained provisions requiring arbitration, but other provisions retained for the loan company the right to a judicial forum for purposes of collection and foreclosure proceedings. *Arnold v. United Companies Lending Corp.*, 204 W. Va. 229 511 S.E.2d 854, (W. Va. 1998). The Court noted that the WVCCPA was specifically designed to eradicate these unconscionable provisions. *Arnold*, 204 W. Va. at 234, 511 S.E.2d at 859.

9. The WVSCA found in *Arnold* that there was no evidence that the loan broker made any other loan option available to the consumer and that the relative positions of the parties were an unsophisticated, elderly consumer and a national corporate lender. *Id.* at 236, 511 S.E.2d at 861.

10. The WVSCA also held in *Arnold* that:

> "In real life we can envisage arbitration provisions being imposed upon consumers in contract situations where consumers are totally ignorant of the implications of what they are signing, and where consumers bargain away many of the protections which have been secured for them with such difficulty at common law."
>
> * * *
>
> "Where an arbitration agreement entered into as part of a consumer loan transaction contains a substantial waiver of the borrower's rights, including access to the courts, while preserving the lender's right to a judicial forum, the agreement is unconscionable, and, therefore, void and unenforceable as a matter of law."

Id. at 236-37, 511 S.E 2d at 861-62 (W. Va. 1998).

11. The WVSCA addressed a similar issue in *State ex rel. Dunlap v.* Berger, where the Court found arbitration provisions limiting punitive damages and class action relief to be unconscionable in the context of an insurance agreement. *Dunlap*, 211 W. Va. 549, 567 S.E.2d 265 (W. Va. 2002).

12. The WVSCA in *Dunlap* also found that the provisions limiting punitive damages and class action relief were unconscionable provisions of a adhesion contract, which did not allow for the full exercise of the plaintiff's rights. *Dunlap*, 211 W. Va. at 567, 567 S.E.2d at 283.

13. In finding that the contract in *Dunlap* was an adhesion contract the WVSCA noted various definitions of such. contracts, which included "all form contracts submitted by one party on the basis of this or noting. *Id.* at 557, 567 S.E.2d at 273.

14. The contract at issue in Dunlap was pre-printed form. Id. at 554, 567 S.E.2d at 270.

15. The Dunlap Court held that:

> "Exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. Syllabus pt. 2, *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E 2d 265 (W. Va. 2002).

16. The parties in *Dunlap* stipulated that the consumer could not obtain punitive damages or class action relief in an arbitration proceeding. *Id.* at 563, 567 S.E.2d at 271. The *Dunlap* Court found that the $8.46 insurance charge that the consumer was challenging was the type of claim that class action claims and remedies are effective at addressing and that "[c]lass actions are essential to the enforcement and effective vindication of the public purposes and protections of the underlying [consumer protection] law." *Dunlap*, 211 W. Va. at 564, 567 S.E. 2d at 279.

CONCLUSIONS OF LAW

1. The arbitration provisions contained in RAL Documents, as cited above, are one-sided provisions of non-mutuality. The provisions preserve, almost exclusively for the Defendants, the rights of offset, self-help, and a judicial forum.

2. This non-mutuality is unconscionable under the plain language of the *Arnold* decision.

3. This Court finds that the arbitration provisions at issue are exculpatory and would unconscionably impair rights that are afforded under West Virginia law, which was designed to protect the public from these types of provisions.

4. The fact that the provisions preclude plaintiffs ability to participate in a class action unless the defendants decide to not force arbitration results in a situation, similar to that in Dunlap, where consumers are not able to effectively pursue their state law rights.

5. The only situation in which the plaintiffs could benefit from a class action suit is where the defendants would agree to not force arbitration. Of course, the defendants would not likely allow class action claims unless it was to their benefit.

6. At the hearing on the Defendants' Motion, counsel admitted that H & R Block voluntarily joined a class action from which it had already been dismissed on a motion to compel arbitration.

7. Although the Defendants claim that the plaintiffs have the same right as the defendants, to avoid class action by forcing arbitration, this equality is transparent. It is true that both parties may have an economic incentive to allow claims to be certified under a class action suit. However, as with many class action claims, the Defendants' ability to force arbitration effectively results in an inability of many plaintiffs to pursue their claims due to costs.

8. If forced into arbitration the plaintiffs, under the arbitration provisions, would then be responsible for their own attorney fees, and attorneys do not have the added incentive of taking their case based on the potential attorney fee award: Hinging the plaintiffs' right to class action relief upon the Defendants' preferences is contrary to the intent of assuring West Virginia consumers the class action relief.

9. This type of restriction on the rights of West Virginia consumers is substantially limiting to state law rights, and such provisions, in the context of this case, are therefore unconscionable under West Virginia law.

10. Block has offered no serious evidence or argument to suggest that this clause would not effectively act as an exculpatory clause, nor have they drawn this Court's attention to any exceptional circumstances that would suggest that the provisions are conscionable.

11. Realistically, it is clear from this record that the arbitration clause at issue would not permit consumers, such as the plaintiffs, to effectively vindicate their legal rights with claims of this sort.

12. While a finding that the provisions are unconscionable is enough to defeat Defendants' Motion, the Plaintiffs also allege that the arbitration provisions constitute adhesion contracts. Based on the scant representations and evidence presented, the arbitration provisions may well constitute an adhesion contract, but this Court need not reach that issue at this point. Further discovery may reveal more conclusively whether this agreement was an adhesion contract.

13. For these reasons, this Court finds that at least two provisions of the Arbitration Provision contained in the RAL documents are unconscionable and violative of West Virginia state law. These provisions are unenforceable as defined by the Supreme Court of Appeals of West Virginia. *See State ex. rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (W. Va. 2002); *Arnold v. United Companies Lending Corp.*, 204 W. Va. 229, 511 S.E.2d 854 (W. Va. 1998). West Virginia law, as articulated in these two cases, provides an independent and adequate basis for revocation of any contract, including whatever contractual obligations the RAL documents created between defendants and plaintiffs.

1. For the reasons set forth above, the agreement to arbitrate is unconscionable and is not entitled to enforcement. Accordingly, the Served Defendants' Motion to Compel Arbitration is **DENIED**.

2. The Court next considered defendants' oral motion to sever the portions of the arbitration provisions deemed to be unconscionable and to enforce the remaining provisions. This Court finds that the parts of the arbitration provisions that are unconscionable are fundamental to the arbitration provisions as a whole and therefore, this Court finds that the entire arbitration provision is unenforceable and void. Defendants' oral motion to sever the arbitration provision is therefore **DENIED**.

3. The Court next considered the Defendants' oral motion to stay all proceedings pending appeal of this Court's ruling as to arbitration. After hearing the arguments of counsel, the Defendants' Motion to Stay is **DENIED**.

4. The objection of any party to the entry of this order is hereby noted and preserved.

5. The Clerk is **DIRECTED** to send certified copies of this Order to all counsel of record, which shall include Brian A. Glasser, Michael B. Victorson, and Michael D. Pospisil and N. Louise Ellingsworth. Copies of this Order for Mr. Pospisil and Ms. Ellingsworth shall be sent to Bryan Cave LLP, One Kansas City Place, 1200 Main Street, Suite 2500, Kansas City, Missouri, 64105-2100.

ENTER this 1st day of June 2004.

/s/
Judge Louis H. Bloom

APPENDIX C

LOAN APPLICATION, AUTHORIZATION AND CERTIFICATION FOR A REFUND ANTICIPATION LOAN ("RAL")

A RAL Program Offered By Household Bank, f.s.b. ("HB") In Association With H&R Block ("ERO")

1. INFORMATION

Applicant's Name	Joint Applicant - Spouse (if joint return)
Deadra D. Cummins First Last	_____ First M.I/ Last
Social Security # 223-23-755	Social Security # _____-_____-_____
Date of Birth 02/14/65 See "NOTE" below	Date of Birth _____/_____/_____
Home Phone # (301) 340-5815 (Required)	Home Phone # (___)___-____ (Required, if different)
Work Phone # (304)354-7250 (Required, if employed)	Work Phone # (___)___-____ (Required, if employed)

* * * *

11. ARBITRATION PROVISION:

A. By signing this RAL application or the Loan Agreement (collectively the "Documents"), I hereby agree that any claim, dispute or controversy, whether in contract, tort (intentional or otherwise), whether pre-existing, present or future, and including constitutional, statutory, common law, regulatory, and equitable claims with HB (as defined below) in any way relating to (a) the Documents or a similar documents for prior years, (b) advertisements, promotions, or oral or written statements related to RALs, and/or (c) the relationships of the

parties, including the validity, enforceability or scope of this Arbitration Provision or any part thereof (collectively the "Claim"), shall be resolved, upon the election of either me or HB, by binding arbitration pursuant to this Arbitration Provision and the applicable rules of either the American Arbitration Association ("AAA"), JAMS/Endispute ("JAMS") or the National Arbitration Forum ("NAF") in effect at the time the Claim is filed. The party initiating the arbitration proceeding shall have the right to select one of these three arbitration administrators. The arbitrator must be a lawyer with more than ten (10) years of experience or a retired or former judge. In the event of a conflict between this Arbitration Provision and the rules of the arbitration administrator, this Arbitration Provision shall govern.

B. HB hereby agrees not to invoke its right to arbitrate an individual Claim I may bring in small claims court or an equivalent court, if any, so long as the Claim is pending only in that court. No class actions or joinder or consolidation of claims with other persons, are permitted without the consent of the parties hereto. On any claim I file, I will pay the first $50.00 of the filing fee. At my request, HB will pay the remainder of the filing fee and any administrative or hearing fees charged by the arbitration administrator, up to $1,500.00 on any Claim asserted by me in the arbitration. If I should be required to pay any additional fees to the arbitration administrator, HB will consider a request by me to pay all or part of the additional fees; however, HB shall not be obligated to pay any additional fees unless the arbitrator grants me an award. If the arbitrator grants me an award in my favor, HB will reimburse me for any fees paid or owed by me to the arbitration administrator up to the amount of the fees that would have been

charged if the original Claim had been for the amount of the actual award in my favor. If the arbitrator issues an award in HB's favor, I will not be required to reimburse HB for any fees HB has previously paid to the arbitration administrator or which H&B is responsible. Any participatory arbitration hearing that I attend will take place in federal judicial district. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16 (the "FAA"). The arbitrator shall apply substantive law consistent with the FAA and the arbitrator's award shall not be subject to appeal, except as permitted by the FAA. Upon request of either party, the arbitrator shall prepare a short reasoned written opinion supporting the arbitration award. Judgment upon the award may be entered in any court having jurisdiction. Nothing in this Arbitration Provision shall be construed to prevent HB's use of offset or other contractual rights involving payment of my income tax refund or other amount on deposit with HB to pay off any RAL debts or ERO or other fees now or hereafter owned by me to HB or any other RAL Lender or ERO or third party pursuant to the Documents or similar prior documents.

C. I ACKNOWLEDGE THAT I HAVE A RIGHT TO LITIGATE CLAIMS IN COURT BEFORE A JUDGE OR JURY, BUT I PREFER TO RESOLVE ANY SUCH CLAIMS THROUGH ARBITRATION AND HEREBY KNOWINGLY AND VOLUNTARILY WAIVE MY RIGHTS TO LITIGATE SUCH CLAIMS IN COURT BEFORE A JUDGE OR A JURY, UPON ELECTION OF ARBITRATION BY HB OR BY ME. I ACKNOWLEDGE THAT I WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS

PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION, EVEN IF SUCH CLASS ACTION IS PENDING ON THE EFFECTIVE DATE OF THIS ARBITRATION PROVISION, EXCEPT THAT THIS ARBITRATION PROVISION WILL NOT PRECLUDE MY PARTICIPATION IN A CLASS WHICH HAS ALREADY BEEN CERTIFIED ON THE EFFECTIVE DATE OF THIS ARBITRATION PROVISION.

D. I understand that one or more affiliates of HB are defendants in several class action lawsuits challenging various aspects of HB's RAL program. Unless a class has been or is certified in one or more of these lawsuits prior to the effective date of this Arbitration Provision and the certification has not been overturned, I acknowledge that by signing the Documents, I may be giving up my right to participate as a member of such class if HB decides to arbitrate such a claim. This means I may not be able to obtain financial or other benefits which might ultimately be paid to or conferred upon members of the class.

E. This Arbitration Provision shall supersede any prior Arbitration Provision contained in any previous RAL application or loan agreement and shall survive repayment of my RAL and termination of my account. If any portion of this Arbitration Provision is deemed invalid or unenforceable, it will not invalidate the remaining portions of this Arbitration Provision.

F. As used in this Arbitration Provision, the term "HB" shall mean Household Bank, f.s.b., and H&B Block, Inc., and each of their parents, wholly or majority-owned subsidiaries, affiliates, predecessors, successors, and the franchisees of any of them, and each of their officers, directors, and employees.

G. Contacting Arbitration Administrators: If I have a question about the arbitration administrators mentioned in this Arbitration Provision or if I would like to obtain a copy of their arbitration rules, I can contact them as follows: American Arbitration Association, 335 Madison Avenue, New York, NY 10017, www.adr.org. Arbitration rules for the Resolution of Consumer-Related Disputes (applicable to requests for arbitration filed by a consumer involving a claim under $10,000), Commercial Arbitration Rules (for all other claims), JAMS, 45 Broadway, 28th Floor, New York, NY 10017, www.jamsadr.com, Financial Services Arbitration Rules and Procedures, National Arbitration Forum, P.O. Box 50191, Minneapolis, MN 55405, www.arb-forum.com, Code of Procedure.

* * * *

(2)

Supreme Court, U.S.
FILED
JAN 3 - 2005
OFFICE OF THE CLERK

No. 04-751

IN THE

Supreme Court of the United States

H&R BLOCK, INC., H & R BLOCK TAX SERVICES, INC., H & R BLOCK EASTERN TAX SERVICES, INC., BLOCK FINANCIAL CORPORATION, H&R BLOCK SERVICES, INC., MELANIE LESTER, JASON BROWN, BOBBY HAGUE, ROBERT HECKERT, CYNTHIA LANTZ, CLARENCE E. MILLER, CARLA R. LEWIS, DEBRA RIGGLEMAN and JOHN DOE,

Petitioners,

v.

DEADRA D. CUMMINS, on her own behalf and on behalf of those similarly situated, and IVAN and LaDONNA BELL, on their own behalf and on behalf of those similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Despite the attention-grabbing rhetoric of this Petition for *certiorari* and contentions that the decision below raises crucial questions about the reach of the Federal Arbitration Act ("FAA") and the ability of corporations to protect themselves from consumer class actions, this case is not really about either arbitration or class actions. The questions presented by Petitioners ("Block") mislead because they assume that a contract existed between Respondents and Petitioners. The trial court held otherwise, entirely on state law grounds, and Petitioners did not appeal that ruling. Instead, Petitioners raise questions here completely unrelated to the ruling below. Petitioners would have this Court reverse the state court finding that there was no contract at all, which was based on state law principles that apply to any contract. This holding relies on bona fide separate, adequate, and independent state law grounds, as is proper under this Court's well-settled interpretation of Section 2 of the FAA.

The opinion below found the arbitration agreement to be one-sided, non-mutual, and exculpatory, twice rendering it unconscionable. None of these features is unique to or inherent in arbitration. Under West Virginia's general law of contracts, unconscionability is a defense to contract formation. *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 860 (W. Va. 1998)(citing *Art's Flower Shop v. The Chesapeake and Potomac Telephone Co. of West Virginia*, 413 S.E.2d 670, 675 (W. Va. 1991)). Unconscionable contracts are void and unenforceable as a matter of law. *Id.* As the opinion below makes clear, any of these features would have been unconscionable under West Virginia law had they been contained in a contract that did not involve arbitration.

Block seeks a ruling that West Virginia law should be overridden by the FAA if such provisions are contained in a contract that *also* includes an arbitration provision. Nothing in the FAA permits parties to launder illegal contract terms

simply by putting them under the "arbitration" heading in a contract. Block believes that arbitration agreements occupy a higher footing than other contracts, but this Court has held exactly the opposite. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 271 (1995)(Congress intended the FAA to "place [arbitration] agreements upon the same footing as other contracts").

The opinion below merely applies state contract law as set forth in numerous opinions from the state's highest court and comports with principles stated in a large number of that court's decisions that have nothing to do with arbitration. In an attempt to dress up state law in federal garb, Petitioners misstate West Virginia contract law, the terms of the subject arbitration clause, and the basis for the trial court's holding. Once these matters are cleared up, it is indisputable that the opinion below is entirely consistent with general state law of contracts and this Court's arbitration decisions. This Court has consistently taught that arbitration clauses need not be enforced if they violate generally applicable principles of state contract law. That is what happened in this case.

The decision below is not worthy of *certiorari* and the Petition should be denied.

STATEMENT OF THE CASE

A. The Underlying Transaction

Block provides tax preparation services throughout West Virginia and offers its tax preparation clients refund anticipation loans ("RALs"). A RAL is a high interest, short term loan secured by a taxpayer's expected income tax refund. The RAL that Ms. Cummins purchased required Block to act as an intermediary or broker. Block advertised its ability to help consumers get a RAL, completed and filed the necessary Internal Revenue Service ("IRS") form, printed and completed the RAL applications for Ms. Cummins, verified Ms. Cummins' identity, transmitted the necessary information to the IRS and the RAL lender, negotiated the

deals under which all its customers would receive their RALs, and printed the check for Ms. Cummins. Discovery also revealed that Block controlled interest rates and credit criteria for the RALs. Although Block acted as an agent for its clients, they were never told that more than half the cost of these loans went to Block in an undisclosed kickback. Respondents say that arrangement violates Block's state law duties as a loan broker, agent or credit services organization.

Every year, the RAL lender, with input from Block, prints a form RAL application. Block provides the same, or substantially the same, RAL application to all of its West Virginia customers, at least on a year-by-year basis. Since 1997, those RAL agreements have contained an arbitration provision. The arbitration provisions evolved over the years, so in reality there are seven (7) separate arbitration provisions at issue in this case.[1] For purposes of this response, however, Ms. Cummins will do as Block did and address only the 2002 arbitration provision.

B. Petitioner's Mandatory Arbitration Clause

The 2002 form RAL application documents include a mandatory arbitration clause which provides:

> By signing this RAL application or the Loan Agreement (collectively the "Documents"), I hereby agree that any claim, dispute or controversy, whether pre-existing, present or future, and including constitutional, statutory, common law, regulatory, and equitable claims with HB (as defined below) in any way relating to (a) the

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[1] The RAL documents first included an arbitration provision in the 1997 RAL application for tax year 1996. Thereafter Block modified the provision from year to year. The existence of seven different arbitration provisions in this case might, if certiorari were granted, create serious difficulties either (i) deciding the case, (ii) deciding whether to limit consideration to the provision raised in the Petition, or (iii) deciding whether to remand the case.

> Documents or a similar documents [sic] for prior years, (b) advertisements, promotions, or oral or written statements related to RALs, and/or (c) the relationships of the parties, including the validity, enforceability or scope of this Arbitration Provision or any part thereof (collectively the "Claim"), shall be resolved, upon the election of either me or HB, by binding arbitration pursuant to this Arbitration Provision[.]

Only in the arbitration clause, "HB" includes Block. Throughout the rest of RAL documents, "HB" refers only to "Household Bank," the lender.[2] The mandatory terms that limit Block's clients' rights, however, protect certain remedies for Block and Household Bank:

> Nothing in this Arbitration Provision shall be construed to prevent HB's use of offset or other contractual rights involving payment of my income tax refund or other amount on deposit with HB to pay off any RAL debts or ERO or other fees now or hereafter owed by me to HB or any other RAL lender or third party pursuant to the Documents or similar prior documents.

"ERO fees" are the fees Block (the Electronic Return Originator) charges its customers. This clause states that Block can take any actions it wants to collect anything it can

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[2] *See* Pet. App. 18a ("As used in this Arbitration Provision, the term "HB" shall mean Household Bank, f.s.b., and H&B [sic] Block, Inc.[.]") Everywhere else in the RAL documents "HB" refers to Household Bank. *See, e.g.* Pet. App. 15a("A RAL Program Offered by Household Bank, f.s.b. ("HB") in Association with H&R Block ("ERO").) Everywhere outside the Arbitration Provision, H&R Block is referred to as "ERO" standing for "Electronic Return Originator." These altered meanings for defined terms illustrate the obfuscating legalese through which RAL clients, laypersons, were required to wade. They also raise the question, discussed below at Part V, whether Block as a mere possible third-party beneficiary to the arbitration document has any right under West Virginia law to enforce these provisions.

from Ms. Cummins on behalf of itself and numerous other entities, but Cummins must arbitrate.

The arbitration clause goes on to foreclose any possibility of anyone bringing a class action against Block:

> Unless a class has been or is certified in one or more of these lawsuits prior to the effective date of this Arbitration Provision and the certification has not been overturned, I acknowledge that by signing the Documents, I may be giving up my right to participate as a member of such class if HB decides to arbitrate such a claim. This means I may not be able to obtain financial or other benefits which may ultimately be paid to or conferred upon members of the class.

Under this provision, "[n]o class actions or joinder or consolidation of claims with other persons, are permitted without consent of the parties hereto." Pet. App. 16a.

C. The State Court Proceedings

Ms. Cummins filed this case on January 23, 2003 in the Circuit Court of Kanawha County, West Virginia, as a putative class action alleging that Block's secret profits violate its duties as agent, loan broker or credit services organization under state law. The class is limited to West Virginia consumers. Block removed the case to federal court, and that Court remanded on June 6, 2003, finding no federal jurisdiction. The First Amended Complaint, filed July 29, 2003, added Ivan and LaDonna Bell as additional putative class representatives. The Kanawha County trial court heard Block's motion to dismiss and compel arbitration on December 11, 2003. At a second hearing on March 18, 2004, the court denied Block's motions from the bench and issued a written order to that effect on June 1, 2004. Pet. App. 3a.

Block twisted the trial court's June 1 Order in the Petition for *certiorari*. In its June 1 Order, the court relied wholly on state contract law to hold that the RAL application

contains a host of non-mutual, exculpatory, unconscionable provisions that "provide[] an independent and adequate basis for revocation of . . . whatever contractual obligations the RAL documents created[.]" Pet. App. 13a. The court relied on "general contract law principles relating to the revocation or enforcement of any contract, not just one for arbitration." Pet. App. 7a. Based on decisions from the state's highest court, the Supreme Court of Appeals of West Virginia (WVSCA), the trial court found the question whether a contract or provision is unconscionable is a gateway matter and should be decided by the court. Pet. App. 8a. The trial court placed its decision in the context of the FAA and the West Virginia Consumer Credit and Protection Act ("WVCCPA"), Pet. App. 8a-9a, and then supplemented that discussion with an analysis of the provisions of the WVCCPA relating to unconscionable contract provisions. Pet. App. 9a. The court then examined West Virginia law with respect to unconscionable provisions in contracts, both contracts of adhesion and non-adhesive agreements. Pet. App. 9a-11a.

The trial court applied these state law contract principles to the provisions in the Block RAL documents. The court found the arbitration provisions to be "one-sided provisions of non-mutuality [that] preserve, almost exclusively for [Block], the rights of offset, self-help, and a judicial forum." Pet. App. 11a. Under West Virginia law, such "non-mutuality is unconscionable." *Id.* The court next found that the arbitration provisions "are exculpatory and would unconscionably impair rights that are afforded under West Virginia law, which was designed to protect the public." Pet. App. 12a.

The court extended its non-mutuality analysis to the class-action provisions, noting that counsel for Block had admitted at hearing that Block "voluntarily joined a class action from which it had already been dismissed on a motion to compel arbitration."[3] *Id.* Given the textual non-mutuality

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[3] In that case, Block tried to settle similar claims nationwide for less than two dollars each. The Seventh Circuit, in stern voice, vacated the

and this history of use, the court found the ostensible equality claimed by Block under this provision "transparent." Pet. App. 12a. Further, the court examined the provisions limiting Block's clients' ability to pursue their claims and their state law rights. *Id.* The court also explained that Block's putative contractual rights result "in an inability of many plaintiffs to pursue their claims due to costs" and that those costs include attorney fees. *Id.* According to the court, such provisions, "substantially limit [ ] state law rights" and "in the context of this case, are therefore unconscionable under West Virginia law." Pet. App. 13a. The court also relied on Block's failure to offer any serious evidence or argument that the clause "would not effectively act as an exculpatory clause," or to draw the court's attention "to any exceptional circumstances that would suggest that the provisions are conscionable." *Id.* The court declined to determine before more discovery whether the documents were an adhesion contract. *Id.*

The court then concluded that at least two provisions of the RAL contracts "are unconscionable and violative of West Virginia state law." Pet. App. 13a. These provisions, the court held, "are unenforceable as defined by the Supreme Court of Appeals of West Virginia." *Id.* (citing *State ex. rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va.), *cert. denied*, 537 U.S. 1087 (2002); *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998)). The court noted that "West Virginia law, as articulated in these two cases, provides an independent and adequate basis for revocation of any contract, including whatever contractual obligations the RAL documents created between defendants and plaintiffs." *Id.* Finally, the court found the entire arbitration provision unenforceable and void. Pet. App. 14a.

Block petitioned the West Virginia Supreme Court of Appeals for a writ of prohibition (a form of discretionary,

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settlement as unfair and remanded the case. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277 (7th Cir. 2002)(Posner, J.).

interlocutory appeal), which the Court denied unanimously on September 2, 2004. Pet. App. 1a.

On October 22, 2004, at its hearing on Ms. Cummins' motion for class certification, the trial court granted Cummins' motion to file a Second Amended Complaint, which named as defendants two additional Block corporate subsidiaries, Block Financial Corporation and H & R Block Services, Inc. The new defendants, joined by the original defendants, removed the case to federal district court November 22, 2004. Meanwhile, the original defendants petitioned this Court for *certiorari* on December 2, 2004. At the time of the petition, there was no final judgment from which to appeal.[4]

ARGUMENT

I. The Decision Below Comports with the Decisions of this Court

The FAA does not force people to arbitrate, but enforces their agreements to do so. "[A]rbitration is simply a matter of contract between the parties[.]" *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). The FAA realizes "a congressional desire to enforce agreements into which parties had entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985). Federal arbitration law "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Information Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). The Act was designed "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967). Congress intended "courts to 'enforce [arbitration]

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[4] Ultimately, the district court remanded with sanctions ordered *sua sponte*. *See Cummins v. H&R Block, Inc.*, Civil Action No. 2:04-1252 (S.D. W. Va. Dec. 10, 2004)(attached as Resp. App. A.)

agreements into which parties had entered,' . . . and to 'place such agreements upon the same footing as other contracts.'" *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 271 (1995)(citations omitted). These are well-established principles of federal arbitration law, which presume that parties have entered into a contract. They are principles the trial court observed in this case.

Under Section 2 of the FAA, agreements to arbitrate controversies "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). This Court has held that in determining if there are legal or equitable grounds to revoke a contract, "courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. Similarly, "the interpretation of private contracts is ordinarily a question of state law." *Volt Info. Sciences.*, 489 U.S. at 474. "[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). These principles, too, were followed by the trial court when it applied West Virginia contract law to hold the provision unconscionable. Such a determination was foreseen by this Court in *Allied-Bruce*, where it explained:

> In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract."

Id., 513 U.S. at 281.

This Court has identified only one exception to its rule applying state contract law to arbitration clauses. The FAA

preempts only where state law targets arbitration clauses for less favorable treatment than other types of contracts. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (FAA preempts a state statute that imposed specific disclosure requirements only on arbitration agreements); *Allied-Bruce*, 513 U.S. at 281 (FAA preempts any state policy that "would place arbitration agreements on an unequal 'footing' with other contract terms").

In examining the arbitration provision, the trial court applied rules of unconscionability grounded in state contract law. These principles are equally applicable to any contract with any subject matter, including arbitration. As discussed above, the trial court did nothing unusual when it applied the identical unconscionability principles, well-established in state law, to the arbitration clause in the case below. This Court mandates that courts follow ordinary state-law contract principles when they consider arbitration agreements, a rule the trial court followed. "In resolving this motion," the lower court stated, "this Court must apply general contract law principles relating to the revocation or enforcement of any contract, not just one for arbitration." Pet. App. 7a.

II. Because the Trial Court Below Relied on State Law Principles Applicable to All Contracts, the Decision Below Does Not Justify a Grant of *Certiorari*

As set forth in the Statement of Facts, the trial court's order in this case is rooted in the generally applicable state common law of unconscionability, as well as the provisions of the West Virginia Consumer Credit and Protection Act. Pet. App. 8a-11a This judge did nothing that courts do not do every day with the Supreme Court's blessing: apply principles of contract formation and void contracts that are unconscionable. These principles are not specific to arbitration law, but instead are consistent with an unbroken line of West Virginia cases not involving arbitration, all of which held that similar one-sided, non-mutual, and exculpatory clauses are unconscionable. In every one of these

non-arbitration cases, the court first resolved the contract formation issue of unconscionability.[5]

"'Unconscionability' is a general contract law principle, based in equity, which is deeply ingrained in both the statutory and decisional law of West Virginia." *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 859 (W. Va. 1998). In *Art's Flower Shop, supra*, for example, the Court held that a contractual provision limiting the phone company's liability to twice the cost of an advertisement was unconscionable as applied to a plaintiff bringing claims for much larger compensatory and punitive damages. The West Virginia Supreme Court's holding in this non-arbitration case that such terms were "unreasonably favorable" to defendant, 413 S.E.2d at 675, is entirely consistent with the trial court's holding in the instant case. The West Virginia Supreme Court has stepped in to eliminate such non-mutuality in cases not involving arbitration. *E.g., U.S. Life Credit Corp. v. Wilson*, 301 S.E.2d 169 (W. Va. 1982) (finding unconscionable credit contract waiving a borrower's statutory right to sue if the creditor published his indebtedness).

Similarly, the West Virginia Supreme Court's rule that exculpatory clauses are unconscionable applies evenhandedly to all contracts. Syl. Pt. 1, *Dunlap, supra*. That court has applied this rule in numerous non-arbitration cases. *E.g.* Syl. Pt. 1, *Murphy v. North American River Runners*, 412 S.E.2d 504 (W. Va. 1991) (exculpatory clause releasing defendant from liability for reckless behavior is void as against public policy); *Johnson v. Junior Pocahontas Coal Co.*, 234 S.E.2d 302 (W. Va. 1977) (exculpatory clause could not insulate strip mining contractor for liability for damages to a nearby

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[5] Petitioners agree that courts should consider challenges to whether an arbitration clause was validly agreed to. Pet. at 20, n.4. They seek, however, to distinguish such "procedural" from substantive unconscionability. West Virginia law does not recognize this distinction. *See Troy Mining Corp. v. Itman Coal Co.*, 346 S.E.2d 749, 753 (W.VA. 1986).

property); Syl. Pt. 6, *Hill v. Joseph T. Ryerson & Son, Inc.*, 268 S.E.2d 296 (W. Va. 1980). Not all contracts are found unconscionable, of course. The same Court applied the identical equitable principles to find provisions in a commercial agreement conscionable. *Troy Mining Corp. v. Itmann Coal Co.*, 346 S.E.2d 749, 753 (W. Va. 1986)

None of these cases involves an arbitration clause, and each establishes that the decision below is simply an application of generally applicable state law involving non-mutual exculpatory clauses. Because none of the cases cited by Petitioners involves West Virginia law on this topic, there can be no conflict between these authorities, except to the extent that the FAA might ever be construed to preempt generally applicable state contract law.[6]

Ignoring the holding of the trial court below, Petitioners instead attack *State ex rel. Dunlap v. Berger, supra.* Petitioners excoriate *Dunlap* as an example of West Virginia state law's "outright antagonism toward arbitration." [7] Pet. at 2. To the extent that any of the cases cited by Petitioners

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[6] This pure state law basis for the trial court's holding, a ground that Block never appealed, itself deprives this Court of jurisdiction. The decision of the court below that there was no contract rests explicitly on bona fide separate, independent and adequate state law grounds. *Michigan v. Long*, 463 U.S. 1032 (1983).

[7] Petitioners also fear that they could be exposed to nationwide class actions if one jurisdiction "disregards" their arbitration provision. Pet. at 3. That fear is unfounded both in this case and in the state of West Virginia. The instant case involves only plaintiffs getting RALs in West Virginia. There are no multi-state claims. In addition, West Virginia recently threw up barriers to such a class action. To demonstrate typicality, the state Supreme Court required putative class action plaintiffs from seven different states to show their medical monitoring claims were based on the same legal theory. *State ex rel. Chemtall, Inc. v. Madden*, __ S.E.2d __, 2004 WL 2750996 (W. Va. 2004). Because the various states had various medical monitoring laws, or recognized no such claim, typicality could not be satisfied. The nationwide class Respondents fear would likely meet the same fate in West Virginia.

reach conclusions contrary to this result, this reflects a difference between the varying law of exculpatory clauses in different states. There is a growing body of law around the nation addressing the issue of whether contracts of adhesion may prohibit consumers from bringing their claims on a class action basis in cases that do not involve arbitration. It is clear from this body of law that entirely apart from arbitration issues, different states have reached different results on the question. *Compare America Online v. Superior Court,* 90 Cal. App. 4th 1, 8 (2001) (forum selection clause that required consumers to bring claims in Virginia, a state which does not permit class actions, held unconscionable under California law because consumers could not effectively vindicate their rights in this forum) (case not involving any arbitration clause), *with Gilman v. Wheat, First Securities,* 692 A.2d 454 (Md. 1997) (enforcing identical forum selection clause, as it was not unconscionable under Maryland law) (case not involving any arbitration clause). In *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), a Maryland case, the Fourth Circuit followed *Gilman* in holding that a prohibition on class actions is not unconscionable. This decision is unremarkable because it simply applies Maryland contract law, which differs from the law of West Virginia where contracts that effectively amount to exculpatory clauses are not enforceable, as set forth above.

Block cites a great many cases that involve neither state law unconscionability issues, nor state law limitations on exculpatory clauses, but instead address questions of federal statutory interpretation. Decisions such as *Randolph v. Green Tree,* 244 F.3d 814 (11th Cir. 2001) and *Johnson v. W. Suburban Bank,* 225 F.3d 366 (3d Cir. 2000), *cert. denied,* 531 U.S. 1145 (2001), involve discussions of the language and legislative history of the Truth in Lending Act. These cases say nothing about what state law may or may not be with respect to exculpatory clauses.

Petitioners attack *Dunlap* as being counter to law, on the grounds that the FAA supposedly sweeps away state contract

law as it relates to the class action issue. This claim is simply incorrect. As set forth in Part II above, the FAA does not preempt generally applicable state law contract doctrines such as limitations on exculpatory clauses.

Petitioners attempt to get around this difficulty by claiming that any application of state law relating exculpatory clauses to bans on class actions would necessarily bar arbitration in all cases where a class action might be pursued, and therefore that such law is preempted by the FAA. This boot-strap argument is simply wrong on the merits, as there is nothing inherent to arbitration that bars class-wide relief. No one disputes that Petitioners could have drafted a contract that explicitly permits consumers to bring appropriate claims on a class action basis, but simply chose not to do so. No legal doctrine "forced" petitioners to draft their contract in a way that would insure that their customers could never vindicate their rights.

Petitioners also argue that *Dunlap* is incorrect because West Virginia's law of exculpatory clauses is supposedly preempted by this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In fact, this Court's ruling in *Gilmer* that the right to bring a class action under the federal Age Discrimination in Employment Act (ADEA) might be waivable in an arbitration contract, 500 U.S. at 32, is readily distinguishable from this case. This Court's decision in *Gilmer* was based entirely on the text and legislative purpose of the ADEA, a federal law, and was in no way an interpretation of any state's contract laws with respect to exculpatory contracts.

Gilmer is also very different from this case because in *Gilmer* there was no reason to imagine that a ban on class actions would bar the plaintiff from effectively vindicating his substantive rights. The ADEA provides for greater individual relief in the form of unpaid wages, reinstatement, other equitable relief, liquidated damages, attorney fees and costs. *See* 29 U.S.C. § 626(b) (incorporating remedies available under 29 U.S.C. § 216(b)). Congress apparently was aware of

the fact that ADEA claims are very different from run-of-the-mill consumer claims, as class actions under the ADEA proceed on an "opt-in" basis and are not governed by Rule 23's opt-out provisions for mass claims. *See, e.g., Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 441 (M.D. 1982). The waiver of class-wide relief in consumer cases involving consumer claims for small sums of money, such as the instant case, thus poses a far greater threat to plaintiffs' ability to enforce their rights. *See, e.g., Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

The crucial point Petitioners choose to overlook throughout their Petition is that the trial court below simply applied well-settled principles of West Virginia contract law to void a contract that happened to deal with arbitration. Both state and federal law require this result.

III. When the Trial Court Found the Arbitration Documents Unconscionable, No Contract Was Formed and the Issues of Enforceability and Arbitrability were Mooted

The court below held, "The issue of whether a contract or provision is unconscionable 'is an equitable principle and . . . should be made by the Court.'" Pet. App. 8a (citing Syl. Pt. 1, *Troy Mining*, 346 S.E 2d 749). Petitioners claim when it made this finding, the court "usurped the arbitrator's role by deciding the enforceability issue itself." Pet. at 19. Block asks "whether parties may also properly agree to arbitrate the validity and enforceability of an arbitration agreement that, on its face, applies to a given dispute." Pet. at 10. The answer that follows from the principles enunciated above is that the parties may agree to arbitrate these issues, but a court will uphold only a valid contract. Block seeks to make all arbitration agreements self-enforcing, so that even issues of contract formation go to an arbitrator. Such a rule would fly in the face of the plain text of Section 2 of the FAA and this Court's long-standing interpretation of that same Section. Under Section 2 of the FAA, agreements to arbitrate

controversies "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added).

The logic of Petitioners' slippery slope begins, as most flawed arguments do, with a bland principle: that parties to a contract may validly agree to arbitrate arbitrability, i.e., whether a given dispute falls within the scope of an arbitration clause. Pet. at 10 (citing *First Options*, 514 U.S. at 943; *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986)).[8] The Court has included under arbitrability determinations questions such as whether a claim was timely filed and what kind of arbitration the parties agreed to conduct. Pet. at 21 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)). According to Block, "the logical next question" is "who decides whether enforcement of the arbitration agreement would be unconscionable[.]" Pet. at 21. Petitioners claim this Court should answer thus: "[O]nce a dispute is within the substantive scope of an arbitration agreement in a contract, all challenges to the enforcement of the agreement to arbitrate based on procedures, . . . fees, . . . or remedies should be addressed first to the arbitrator." Pet at 10-11(emphasis added). Through their proposed rule, Petitioners would end-run state contract formation law and the plain text of Section 2 of the FAA.

The cases cited in support of this proposed new rule are all distinguishable from the principles followed by the trial court in this case. *Carbajal v. H & R Block Tax Services*, 372 F.3d 903 (7th Cir. 2004) enforced a broad arbitration clause

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[8] Crucially, Petitioners overlook the holding in *First Options* that "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *Id.*, 514 U.S. at 944. The only qualification is that courts should not assume the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakable[e]" evidence that they did so." *Id.* (citing *AT&T Technologies*, *supra*, at 649).

only because there was no showing that Delaware law would refuse to enforce the terms at issue. *Id.* at 906. In this case, the opposite is true. Block did not even attempt to show that its clause complied with West Virginia law. Such state-specific results are expected because the FAA does not extinguish generally applicable state law of contract formation. The rest of the cases on which Petitioners rely examine unconscionability in light of public policy and arbitration. For example, in *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 726-27 (8th Cir. 2003), it was the court's duty to determine validity of agreement, but the availability of remedies went to an arbitrator. Similarly, in *Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255, 1258-62 (11th Cir. 2003), the court held the issue of fee-shifting in a Title VII case should go to arbitration. In *Great Western Mortgage Corp. v. Peacock, 110 F.3d 222*, 232 (3d Cir. 1997), the issue of inability to collect statutory punitive damages was sent to arbitration. None of these cases, except *Carbajal*, applies principles of contract law applicable to any contract, and *Carbajal* applies the law of Delaware. Instead, in each of these cases the question is whether an arbitration agreement is unconscionable because it limits remedies that would be available in the courts. That was not the issue, or even the type of issue, the court below decided.

The trial court held the arbitration provision unconscionable because the remedies were one-sided and non-mutual. The problem was not that certain remedies were provided or not provided, as in the cases Petitioners cite. The problem was that the remedies were available to one party but not the other. For that reason, the agreement was unconscionable, and so void. Pet. App. 14a. Petitioners accuse the trial court of "running roughshod" over arbitration provisions, Pet. at 23, while they trample the law of contract formation and basic principles of federalism and the FAA. If, as here, unconscionability is applied even-handedly to all contracts, including arbitration agreements, state courts must

apply it to the fundamental question of whether a contract was formed.

Petitioners' rule would make arbitrability self-fulfilling. If some piece of paper says that questions of "validity" and "enforceability," which Block takes to mean contract formation, go to an arbitrator, anyone, anywhere could be forced to arbitrate. The drafter of such a "contract" could effectively extinguish court review of the formation of any contract. Thus, we return to the starting point of this analysis. Petitioners would elevate arbitration clauses to some kind of special status. But they are not special. They are just contracts. Courts decide whether parties made a contract, and that is exactly what the trial court did here.

Under Block's proposed rule, a West Virginia court would have no power to void a local pimp's contract for prostitution services that contained an arbitration provision. An arbitrator would instead have to pass on the issue in the first instance, even though a contract for meretricious acts has long been a quintessential example of an unconscionable contract. *Goode v. Goode*, 396 S.E.2d 430, 437 (W. Va. 1990); *Thomas v. LaRosa*, 400 S.E.2d 809, 812-14 (W. Va. 1990).

IV. The Lower Court's Ruling is Supported by Independent and Adequate State Law Grounds, and if Any of Those Reasons is Supported by Law then It Would Suffice to Justify the Result

As the opinion below makes clear, the trial court found Block's arbitration clause was unconscionable for independent and sufficient reasons, having nothing to do with class actions. *See, e.g.*, Pet. App. 11a ("The arbitration provisions . . . are one-sided provisions of non-mutuality [that] preserve, almost exclusively for [Block], the rights of offset, self-help, and a judicial forum."); Pet. App. 13a ("West Virginia law . . . provides an independent and adequate basis for revocation of any contract, including whatever contractual obligations the RAL documents created[.]") Accordingly,

this Court should not grant *certiorari* in this case because the decision of the court below was correct or not in conflict with some other authority, with respect to any of the independent reasons the court below held to justify its finding.

This Court's decision on the ostensible issues raised by Petitioners would not settle the case below. Nothing in the questions presented settles the issues that would remain, all of which cut against Petitioners' position. First, the trial court declined to decide whether the arbitration provision and RAL documents were a contract of adhesion. Pet. App. 13a. There is no doubt, however, that they are. Block's consumer clients had no ability to negotiate the terms of the RAL agreement that was set before them on a take-it-or-leave-it basis, which is definitive of a contract of adhesion. On remand, the trial court would simply have to return to that issue, find this is a contract of adhesion, and apply the teachings of *Dunlap* that exculpatory provisions in such a contract are presumptively unconscionable – an additional reason for the court below to void this agreement. Although *Dunlap* involved enforcement of an arbitration clause, nothing in the court's statement of the law regarding exculpatory clauses in contracts of adhesion concerns arbitration. Syl. pt. 2, *Id.*, 567 S.E.2d at 275-76.

Second, there is a substantial question whether Block is, in fact, a party that has standing to enforce this agreement at all and thus has standing to appeal. This is another state law question. Block would have this Court believe that the RAL documents recite a contract between Block and its clients. Pet. at 4. Instead, Block's taxpayer clients signed a "loan application" between themselves and the lending bank, Household Bank or "HB." Through creative redaction and interpolation, Petitioners misrepresent the arbitration clause, replacing in their petition the term "HB" with "[petitioners]," so it appears that Block is party to this agreement. *Id.* Although Block brokered the loan, it was no party to the agreement. Block's only possible participation in the RAL contract would be as a third-party beneficiary – and that only

under the arbitration clause. By replacing "HB" with "petitioners" when quoting the Arbitration Provision, Pet. at 4, Block erases this crucial fact. Petitioner Block was not party to any contract, but at most -- possibly -- a third-party beneficiary. The Supreme Court of Appeals of West Virginia has held: "in order for a contract concerning a third party to give rise to an independent cause of action in the third party, it must have been made for the third party's sole benefit." *Robinson v. Cabell Huntington Hosp., Inc.*, 498 S.E.2d 27, 32 (W. Va. 1997) (citations omitted)(emphasis added).[9] Here only the redefinition of the term "HB" in this sole provision brings Block's interests into play. On remand, the question whether Block could enforce this Arbitration Provision would determine its rights in this action. Any decision this Court may make on the issues Petitioners raise is not determinative of further litigation on the relevant causes of action.

Even if this Court should decide the issues Petitioners invent, and decide them against Respondents, nevertheless, this case would be unresolved and return to the trial court on further basic issues of contract formation and standing, all of which rest on well-settled issues of state law contract interpretation, and none of which require Supreme Court intervention.

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[9] Under West Virginia law:

> If a covenant or promise be made for the sole benefit of a person with whom it is not made, one with whom it is made jointly with others, such person may maintain, in his own name, any action thereon which he might maintain in case it has been made with him only, and the consideration had moved from him to the party making such covenant or promise.

W. Va. Code § 55-8-12.

V. This Court Lacks Jurisdiction to Hear the Petition.

A. At the Time of Petition, this Case had been Removed to Federal Court and was Not Subject to any State Court's Jurisdiction

On December 1, 2004, when the Petition for Certiorari was filed, the case appealed from was pending in federal court because the Petitioners consented to removal. Thus no jurisdiction existed at the time of petition. This alone warrants denial of the Petition.

Petitioners attempt to explain away the fact that at the time of petition there was no court to which this Court could issue a mandate by stating, without citation of authority, that the removal does not affect this Court's jurisdiction. *See* Pet. at 8, n.2. Once the case was removed, however, the trial court's order was no longer "final" pursuant to 28 U.S.C. § 1257(a), the statute under which Block asserted this Court's jurisdiction. To the contrary, the order was nothing more than the law of the case, which the district court, had it enjoyed jurisdiction, would have had discretion to follow or ignore. *McMellon v. United States*, 387 F.3d 329, 355 (4th Cir. 2004).

By their unexplained delay in filing here, Petitioners gave themselves a choice between removal and certiorari. They chose removal. Even if this jurisdictional defect were cured by the district court's subsequent remand, these creative procedural acrobatics are reason enough to deny the petition because if accepted, this court would have to carve a judicial exception to the 90-day jurisdictional bar for certiorari petitions. Importantly, nothing prevents this Court's ultimate review. After trial, Block could appeal again to the state supreme court and then petition this Court, should it disagree with the result.

B. The Decision Below is Not Final, but Interlocutory

Jurisdiction is also lacking because the judgment below is not final. In their jurisdictional statement Petitioners rely on *Southland Corp. v. Keating*, where this Court explained:

> Judgments of state law that finally decide a federal issue are immediately appealable when 'the party seeking review here might prevail [in the state court] on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action[.]

465 U.S. 1, 6 (1984)(citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975)). Here the trial court below did not decide a federal issue, but a matter of state contract law. Accordingly, this is not a "final judgment" for purposes of 28 U.S.C. § 1257(a). Rather, there is no federal issue, no subject matter jurisdiction, and for these reasons also the Petition should be denied.

CONCLUSION

This Court should deny *certiorari* because the trial court below properly applied state contract law, applicable to all contracts, not just to arbitration, to find an arbitration provision unconscionable and void. This was an unexceptionable application of state law consistent with the FAA, which raises no important federal questions.

Respectfully Submitted,

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January 3, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
CHARLESTON DIVISION

DEADRA D. CUMMINS, on her behalf
and on behalf of those similarly situated, and
IVAN and LaDONNA BELL, on their own
behalf and on behalf of those similarly situated

Plaintiff,

v. CIVIL ACTION NO. 2:04-1252

H&R BLOCK, INC., H&R BLOCK TAX
SERVICES, INC., H&R BLOCK EASTERN
TAX SERVICES, INC., BLOCK FINANCIAL
CORPORATION, H&R BLOCK SERVICES, INC.,
MELANIE LESTER, JASON BROWN,
BOBBY HAGUE, ROBERT HECKERT,
CYNTHIA LANTZ, CLARENCE E. MILLER,
CARLA R. LEWIS, DEBRA RIGGLEMAN and JOHN DOE

Defendants.

ORDER

Pending before the court is the plaintiffs' motion to remand this action to state court [Docket #5]. For the reasons discussed below, this motion is **GRANTED** and this action is **REMANDED** to state court.

I. Facts

On January 22, 2003, the plaintiff, Deadra R. Cummins, commenced this lawsuit in the Circuit Court of Kanawha County, West Virginia against H&R Block, Inc. (H&R Block), and individual agents of H&R Block, Melanie Lester, Jason Brown, Bobby Hague, and Robert Heckert. The complaint states that the plaintiff went to H&R Block for

income tax preparation services for the years 1998 through 2001, and that in each of those years, an H&R Block agent recommended that the plaintiff apply for a "Rapid Refund." A "Rapid Refund" a Refund Anticipation Loan (RAL) that is funded by a national bank (in this case, either Beneficial National Bank or Household Bank), and secured by the taxpayer's expected tax refund. The complaint alleges that an RAL typically carries an interest rate of between 29% and 750%. The plaintiff seeks recovery for H&R Block's alleged unlawful practice of taking secret kickbacks from the national banks as part of its Rapid Refund program.

The lawsuit alleges the following seven counts of wrongdoing by the defendants: (1) breach of fiduciary duty arising out of an agency relationship; (2) breach of fiduciary duty arising out of a confidential relationship; (3) breach of fiduciary duty arising out of Block's status as a loan broker; (4) violation of West Virginia's statute governing credit services organizations, W. Va. Code § 46A-6C-l et seq.; (5) breach of contract; (6) unjust enrichment; and (7) unfair or deceptive trade practices, in violation of W. Va. Code § 46A-6- 101. Defendant H&R Block was served on January 22, 2003 and defendant Heckert was served on January 31, 2003. It does not appear from the record that any other defendants have been served.

Defendants H&R Block and Heckert filed their first notice of removal on February 20, 2003, asserting: (1) that the case falls within this court's diversity jurisdiction due to the plaintiff's fraudulent joinder of Heckert, a non-diverse defendant; or in the alternative, (2) that the case falls within federal question jurisdiction because the National Bank Act (NBA), 12 U.S.C. §21 t seq., completely preempts the plaintiff's state law claims. The plaintiff then filed a timely motion to remand, arguing that: (1) defendant Heckert is a proper party to the suit, and that his presence in the suit destroys complete diversity, and (2) there is no legal justification for the defendants' complete preemption argument. In an order dated June 5, 2003, this court remanded

the action to state court, finding that the defendants' allegations of fraudulent joinder and complete preemption were inapplicable to the case.

On October 22, 2004, plaintiffs served a copy of their amended complaint on the defendants. The amended complaint added two additional defendants: Block Financial Corporation and H&R Block Services, Inc. On November 22, 2004, these newly added defendants filed a timely Notice of Removal. In this notice, the defendants argue that the action is removable to federal court under the provisions of 28 U.S.C. § 1441(b) because it is one that could have been properly brought under the original subject matter jurisdiction of this court, pursuant to 28 U.S.C. § 1331. This notice of removal again argues that "plaintiffs' claims are removable under the doctrine of complete preemption."

II. Discussion

There are two types of cases in which a district court has original jurisdiction - those cases raising a federal question and those cases involving diversity of citizenship. An action may be removed from state court to federal court if it is one over which the district court would have original jurisdiction. 28 U.S.C. § 1441(b) (2003). The burden of establishing federal jurisdiction is placed on the party seeking removal. *Mulcahey v. Columbia Organic Chems. Co., Inc.*, 29 F.3d 148, 151 (4th Cir. 1994). Because removal jurisdiction raises significant federalism concerns, this court must strictly construe removal jurisdiction. *Id.* If federal jurisdiction is doubtful, remand is necessary. *Id.*

A. Federal Question Jurisdiction & Complete Preemption

A federal question is raised when the plaintiff's well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiffs right to relief necessarily depends on resolution of a substantial question of federal law. *Franchise Tax Rd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10 (1983). The presence of a federal

defense is not sufficient to make a case "arise under" federal law. *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). The narrow exception to this rule is the doctrine of complete preemption. Under this doctrine,

> [w]hen the federal statute completely preempts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under 28 U.S.C. § 1441(b), which authorizes any claim that "arises under" federal law to be removed to federal court.

Beneficial Nat'l Bank v. Anderson, 2003 U.S. LEXIS 4277, No. 02-306 at *6 (U.S. June 2, 2003). Until recently, the United States Supreme Court has recognized that only two federal laws are so inherently powerful that they entirely displace any state claim within their zone of influence. *See Metropolitan Life Ins. Co. v. Tayler*, 481 U.S. 58 (1987) (ERISA); *Avco Corp. v. Machinists*, 390 U.S. 557 (1968) (LMRA). However, in *Beneficial National Bank*, the Supreme Court extended the doctrine of complete preemption to the NBA, holding that the NBA also has this extraordinary preemptive power. 2003 U.S. LEXIS 4277, at *9.

B. First Notice of Removal

In their first notice of removal, the original defendants asserted that removal is appropriate in this case because the plaintiff's state law claims are, in reality, claims alleging the taking of usurious interest in violation of the NBA.[1] The

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[1] The NBA states that "[a]ny association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located . . . ." 12 U.S.C. § 85 (2003). The NBA goes on to penalize the taking of usurious interest: "[t]he taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other

defendants' argued that the plaintiff's state law claims were completely preempted by the NBA because the RALs, the center of the plaintiff's complaint, were offered and funded by a national bank, with H&R Block only acting as an intermediary. The plaintiff, on the other hand, contended that her case does not fall within the scope of the NBA because she neither named a national bank as a defendant nor plead any claims of usury in violation of the NBA.

This court determined that defendant's arguments for removal were without merit. Specifically, this court concluded that "[t]he plaintiff has pled claims for breach of fiduciary duty, violation of West Virginia's statute governing credit services organizations, unfair trade practices, and breach of contract. None of the counts allege the offense of usury, nor do they implicate the NBA in any way." Accordingly, the court found that the doctrine of complete preemption did not apply in this case.

C. Second Notice of Removal

In the most recent notice of removal, the newly-added defendants argue that plaintiffs' claims are completely preempted by federal law because they seek to control and affect the banking operations of national and federal savings banks which are governed exclusively by federal law. Defendants support this assertion by arguing that federal savings banks (like Household) are regulated only by the Office of Thrift Supervision ("OTS") and applicable federal law, *see* 12 C.F.R. § 7.4008, while national banks (like Beneficial) are regulated only by the Comptroller of Currency and applicable federal law. *See* 12 C.F.R. § 560.2(a). Finally, defendant's notice argues that in the past 30 days, the Office of Thrift Supervision (OTS) issued a letter ruling in which it determined that the preemptive force of federal savings bank regulations applies to "agents" who assist federal banks in

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evidence of debt carries with it, or which has been agreed to be paid thereon . . . ." Id. § 86.

their operations. In sum, the defendants' notice states that "[b]ecause the entire field of banking is *completely* preempted by federal law, Plaintiff's claims—which improperly seek to interfere with the banking operations of national and federal savings banks—are removable."

Because the court finds that defendants have confused conflict preemption, which creates a federal defense but does not provide for federal jurisdiction, and complete preemption, the court must remand this action to state court. As the Fourth Circuit noted in *Denny's Inc. v. Cake*, 364 F.3d 521 (4th Cir. 2004):

> "Complete preemption" differs from "ordinary" or "conflict" preemption. Conflict preemption arises when a defendant asserts the affirmative defense that a plaintiff's state law claim is preempted by federal law. *Sonoco Prods. Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 370-71 (4th Cir. 2003). Normally, conflict preemption "does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Id.* at 371 (internal quotation marks and citations omitted). By contrast, complete preemption exists when "Congress so completely preempts a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Id.* (internal quotation marks and citation omitted). With complete preemption, removal to federal court is possible because "the plaintiff simply has brought a mislabled federal claim, which may be asserted under some federal statute."

The *Denny's* Court further explained that "[t]he touchstone of complete preemption is whether Congress intended the federal cause of action to be the exclusive cause of action for the type of claim brought by a plaintiff." *Id*; *See also Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003) (summarizing the doctrine of complete preemption and emphasizing that complete preemption exists only where Congress has intended a federal cause of action to be the exclusive cause of action for a type of claim).

In *King v. Marriot Int'l, Inc.*, 337 F.3d 421 (4th Cir. 2003), the Fourth Circuit further explained that "a vital feature of complete preemption is the existence of a federal cause of action that replaces the preempted state cause of action. Where no discernable federal cause of action exists on a plaintiff's claim, there is no complete preemption, for in such cases, there is no federal cause of action that Congress intended to be the exclusive remedy for the alleged wrong." Thus, as many courts have noted, complete preemption arises only in "extraordinary" situations. *Ansley v. Ameriquest Mortgage Co.*, 340 F.3d 858 (9th Cir. 2003).

In the present case, the defendants have repeatedly argued that "the banking operations of national and federal savings banks are governed exclusively by federal law.... Detailed regulations issued by the 0CC and OTS make clear there is no room for state laws conceming the operations of national and federal savings banks." Assuming *arguendo* that there is conflict preemption between any state law that attempts to regulate national or federal banks and the existing federal banking law, this preemption is not sufficient to create federal "arising under" jurisdiction. Further, as this court noted in its first remand order, no bank is named as a defendant. The defendants attempt to jump this major hurdle by arguing that H&R Block is an agent of the national banks and that the plaintiff's state law claims will impermissibly regulate the national banks. The court finds the latter argument unpersuasive because the defendants have not alleged any specific effect the plaintiffs' state law claims will have on the national and federal banks. The court finds that it is unnecessary to reach the issue of whether H&R Block is an agent within the meaning of the OTS letter because it finds that complete preemption is not available as a basis for federal jurisdiction in this case. As noted above, a vital feature of complete preemption is the existence of a federal cause of action that replaces the preempted state cause of action. The defendants have alleged no federal cause of action that would preempt any of the plaintiffs seven state law causes of action.

In *Pena v. Downey Savings & Loan Assn.*, 929 F. Supp. 1308 (N.D. Ca. 1996), the District Court for the Central District of California further explained the difference between conflict and complete preemption while deciding a similar issue. In that case, the plaintiff's employment with Downey Savings and Loan (Downey) was terminated for an alleged violation of certain company policies. The plaintiff's complaint alleged that her employment relationship with Downey included an implied-in-fact contract and that Downey was required to afford her certain procedures prior to her termination. Downey removed the action to federal court arguing that Pena's state claim for breach of implied contract was preempted by federal law. Specifically, Downey invoked a defense of federal preemption based on 12 C.F.R. § 563.39(a), which requires that all employment contracts between a "savings association" and its employees be in writing and specifically approved by the association's board of directors. *Id.* at 1313. This regulation, like those tangentially at issue in the present case, was promulgated by the Office of Thrift Supervision of the Department of the Treasury and expressly governs employment contracts between federally chartered financial institutions and their employees. *Id.*

Before determining if remand was appropriate, the Pena court first noted that the "well-pleaded complaint rule dictates that 'arising under' jurisdiction exists only where the federal question is apparent on the face of the well-pleaded complaint." (citing *Franchise Tax Brd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983)). The court further noted that "a case may not be removed on the basis of a federal defense even if the defense is anticipated in the complaint and both parties concede that it is the only question at issue." (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987)). The court went on to note that "preemption of state law by a federal statute or regulation ordinarily constitutes a defense to a state law claim." (citing *Fidelity Federal Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153-54 (1982)). The court noted that complete preemption is the one

exception to the well-pleaded complaint rule and indicated that such removal jurisdiction is rare and available only when Congress has preempted an area of law so thoroughly that any complaint raising a select group of claims is necessarily raising a federal claim. *Id.* at 1312-13.

The Pena court then explained the two requirements of complete preemption. *Id* at 1314. First, there must be a federal law that supercedes state law. The court found this requirement was satisfied because "OTS regulations specifically state that they are 'preemptive of any state law purporting to address the subject of the operations of a Federal savings association.'" *Id.* at 1314. The court found, however, that the defendant had not satisfied the second requirement of complete preemption. To satisfy this requirement, Downey needed to show "that the federal law or regulation provides a substitute cause of action." *Id.* In *Pena*, as in the instant case, the defendant did not allege that any federal cause of action existed to preempt the state law causes of action alleged by the plaintiff's complaint. Instead, the defendant in *Pena* and the instant case have both alleged conflict preemption, but have not demonstrated that the extraordinary federal jurisdiction provided by complete preemption exists.

III. Attorney's Fees and Costs

The court also finds that an award of attorney's fees and costs under 28 U.S.C. § 1447(c) is appropriate in this case. Section 1447(c) provides that "an order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Because the court **FINDS** that the defendants arguments were unwarranted under existing law, the court **AWARDS** reasonable attorney's fees and costs to the plaintiffs to compensate for their actual expenses as a result of the defendants' removal. The court **DIRECTS** the plaintiffs to submit to the court a bill for fees and costs with supporting information.

IV. Conclusion

Because the court **FINDS** that federal jurisdiction based on the doctrine of complete preemption is inapplicable in this case, the court **GRANTS** the plaintiffs' motion to remand. The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: December 9, 2003

/s/

Joseph R. Goodwin
United States District Judge

(3)

No. 04-751

Supreme Court, U.S.
FILED
JAN 19 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

H&R BLOCK, INC.; H&R BLOCK TAX SERVICES, INC.; H&R BLOCK EASTERN TAX SERVICES, INC.; ROBERT HECKERT; CYNTHIA LANTZ; CLARANCE MILLER CARLA R. LEWIS; DEBRA RIGGLEMAN; AND JOHN DOE,
Petitioners,

v.

DEADRA R. CUMMINS; IVAN BELL; AND LADONNA BELL, ON THEIR OWN BEHALF AND ON BEHALF OF THOSE SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Nearly all of respondents' arguments boil down to the claim that when an arbitration agreement includes a waiver of the right to bring a class action, a state court may, consistent with the Federal Arbitration Act (FAA), void the waiver of class actions as too "exculpatory" of small claims and then proceed to deny enforcement of the arbitration agreement itself. That is indeed the approach mandated in West Virginia by *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002), and followed here. But contrary to respondents' repeated contentions, there remains a very substantial *federal* question whether the courts of West Virginia -- and the other courts around the country that refuse to enforce arbitration agreements if they also bar class adjudications -- are violating the FAA. Moreover, the federal issue is just as substantial when it comes to the additional ruling below that a court may completely disregard the parties' agreement to arbitrate challenges to the validity and enforceability of an arbitration agreement. Given the disarray in the lower courts on these matters and the importance of the issues, the Court should take this opportunity to address the questions presented by petitioners.

1. As respondents acknowledge, under the FAA, courts are required to put arbitration agreements on an equal footing with other contracts, denying enforcement only for reasons that would apply equally to any other type of agreement. Respondents argue that the court below obeyed that requirement because the principles of state law on which it relied -- the doctrine of unconscionability and the rule barring "exculpatory" clauses in contracts -- are also applied in West Virginia outside the context of arbitration agreements. But the mere fact that the court invoked state contract law in the course of deciding not to enforce an arbitration agreement does not immunize its ruling from

scrutiny under the FAA.[1] The question remains whether the effect of the court's ruling was to disfavor arbitration agreements in a way that Congress forbade.

The West Virginia rule barring parties' waiver of class action procedures effectively mandates that an arbitration agreement, to be enforceable, must allow arbitration of class claims. That may not be quite as extreme as treating all arbitration clauses in consumer contracts as unconscionable *per se* -- a rule that would clearly violate the FAA, *see Dunlap*, 567 S.E.2d at 277 (citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996)). But it is at least highly doubtful that the FAA allows a court to condition its enforcement of an arbitration agreement on defendants' willingness to accept classwide arbitration -- because the *effects* of that rule approach a flat ban on arbitration clauses.

The whole point of the FAA is to encourage agreements to resolve disputes using a procedure that is more informal, speedy and efficient than court adjudication. The statute evinces an "unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); *see* H.R. Rep. No. 68-96, at 2 (1924) (FAA was meant as response to "agitation against the costliness and delays of litigation"). Requiring a potential defendant to accept class arbitration or forsake arbitration altogether effectively defeats the accomplishment of this congressional purpose.

While some courts have recognized and even encouraged class arbitration proceedings, they have also recognized that

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[1] *See* Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 Wake Forest L. Rev. 1001, 1015-16, 1034-35 (1996) (noting that equitable unconscionability holdings may still discriminate against arbitration and run afoul of the FAA).

such a process must be a "hybrid" in which the courts continue to play a very active role. *See generally* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 37-42 (2000). As the California Supreme Court put it:

> Without doubt a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration . . . . The court would have to make initial determinations regarding certification and notice to the class, and if classwide arbitration proceeds it may be called upon to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement.

Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd on other grounds*, 465 U.S. 1 (1984). Other courts have also recognized the need to become involved in such additional matters as the selection of the arbitrator and the management of discovery. *See* Sternlight, *supra*, at 40-42.

Clearly, this kind of complex process, in which the court may continue to play virtually every role other than the finder of fact, was not what Congress had in mind when it passed the FAA. And a potential defendant, when told by a state like West Virginia that this is the only form of arbitration that can be mandated in an enforceable consumer contract, would very likely question the point of asking for an arbitration agreement at all. Given how little class arbitration resembles the simple, quick and informal process the FAA was intended to encourage, there is little *practical* difference between (1) a rule barring all arbitration agreements as

unconscionable (which is clearly unlawful) and (2) a rule barring waivers of class actions in arbitration agreements. It follows that there is a very serious federal question presented concerning whether the latter rule comports with the FAA -- a question that cannot be swept under the rug on the theory that the court below was merely applying state contract law.[2]

Indeed, respondents' argument that state contract law was applied here in full compliance with the FAA becomes all the more unpersuasive when one recognizes that, in West Virginia, a defendant who even tries to insist on dealing only with consumers who agree to arbitrate disputes individually forfeits all rights to arbitrate. In both *Dunlap* and this case, the courts refused to sever the waiver of class actions from the rest of the arbitration agreements and *thus refused to give the defendant even the option of class arbitration*. *See* Pet. App. 14a; *Dunlap*, 567 S.E.2d at 283-84. This additional wrinkle in the courts' analysis further dramatizes the courts' antipathy to arbitration agreements and belies the notion that they are simply applying general state law rules barring exculpatory clauses in consumer contracts in a neutral

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[2] Another problem with the argument is that its very premise is wrong as a matter of West Virginia law. The prior cases invalidating "exculpatory" clauses outside the arbitration context cited in *Dunlap* and cited again here by respondents do not bear the remotest resemblance to the arbitration agreement at issue. They involved form contracts expressly waiving potential liabilities. *See Murphy v. North American River Runners, Inc.*, 412 S.E.2d 504, 510 (W. Va. 1991); *Hill v. Joseph T. Ryerson & Son, Inc.*, 268 S.E.2d 296, 307 (W. Va. 1980); *Dunlap*, 567 S.E.2d at 275 (citing *Murphy* and *Hill*); Opp. 11-12. An agreement requiring that claims be adjudicated individually rather than on a class basis is hardly exculpatory in that sense. And there is no case in West Virginia holding a waiver of the right to bring a class action unconscionable not involving an arbitration agreement. So the reality is that the West Virginia courts have stretched to reach this result only in the arbitration context.

manner.[3] The fact of the matter is that the West Virginia courts have searched for a way to evade their obligations under the FAA and the insistence on maintaining the right to bring a class action provided a convenient mechanism.

Moreover, they are not alone. As noted in the Petition, while there is wide disagreement around the country on these issues, there are a number of other jurisdictions in which arbitration agreements are only enforceable if they allow class arbitration. Respondents dismiss the conflicting cases as reflecting divergent state laws, Opp. 13, but those rulings also diverge in their interpretation of the FAA as applied to an arbitration agreement waiving class actions. *Compare Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 538-39 (Ala. 2002) (addressing federal law and finding unconscionability of class action waiver consistent with FAA) *with AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 199-200 (Tex. App. - Houston [14th Dist.] 2003, no writ) (addressing federal law and holding that class action waiver could not be found unconscionable under the FAA). No matter how much respondents wish that only state law was involved, the mandates of the FAA are unavoidable in this and other cases involving class action waivers. Clearly, there is a glaring need for clarification of *how* the FAA applies when courts use the existence of a class action waiver as a basis for refusing to enforce arbitration clauses as written. Only this Court can supply an answer.

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[3] Respondents also stress that the class action waiver is non-mutual, but that is not literally true, as the class action waiver extends to all parties. Pet. App. 17a. The argument that the class waiver is effectively non-mutual is premised on the same policy argument that it is exculpatory -- that class action procedures benefit the consumer plaintiffs rather than defendants. *See Dunlap*, 567 S.E.2d at 278-80. Thus, any finding that the class action waiver was effectively non-mutual is premised on the same policy judgment that class procedures should be favored at the expense of arbitration agreements.

2. Respondents do not squarely address the second question presented for review -- whether questions of unconscionability should be decided by a court or arbitrator when the Arbitration Provision flatly states that questions of validity and enforceability of a provision should be decided by an arbitrator. Rather, respondents assert that this case is really about whether the trial court properly determined whether a contract existed at all. Opp. 1, 15, 18. This is baffling for two reasons. First, the trial court clearly held the Arbitration Provision was *unenforceable*, not that a contract never existed. Pet. App. 13a. Second, the question whether a court or arbitrator should decide if a contract containing an arbitration clause was validly formed was answered decades ago in *Prima Paint Corp.*, 388 U.S. at 404, which held that the question should go to the arbitrator. The question left open by *Prima Paint* and successive FAA cases is whether challenges to the substantive enforceability of an *arbitration clause* should be determined by a court or arbitrator. As we have shown, a series of recent cases suggests that issues regarding enforceability of an arbitration clause based on unconscionability or limitation of remedies should always go the arbitrator in the first instance. Pet. 19-21. On that question, the "circuit courts are split." *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 316 (5th Cir. 2002); *see* Pet. 21-23 (discussing circuit court decisions).[4] But the answer should be easy to discern where, as here, the parties expressly *agreed* that fights about the

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[4] Although respondents seem to suggest that these cases are inapplicable because they deal with the availability of remedies in arbitration, *see* Opp. 17, the dispute in this case over whether class action relief must be available to plaintiffs is clearly a question about a plaintiff's available remedies. This is apparent from the discussion of policy justifications for class relief in *Dunlap*, 567 S.E.2d at 272 n.3 & 278-79, and other state cases using similar reasoning to void arbitration clauses for lack of class-wide relief. *See* Pet. 13-14.

validity or enforceability of the arbitration clause should be arbitrated.

Contrary to respondents' discussion of these circuit court cases, *see* Opp. 17, the question whether a dispute over the unconscionability of an arbitration clause should go to a court or arbitrator is a question of federal law under the FAA, not at all dependent on state law principles. See Pet. 21-23. Whether or not West Virginia courts treat the question of contract formation as an equitable one to be decided by a court, the FAA may mandate a different approach -- either generally or at least where the parties so agreed. The trial court blithely ignored this issue. The Court should grant review to make clear that a court may not simply disregard the parties' agreement to allow an arbitrator to decide issues of enforceability, including unconscionability.

3. Respondents' remaining arguments also are not persuasive. Respondents contend that the court below provided adequate and independent grounds for affirming the judgment. Opp. 18-19. They rely both on the trial court's tortured interpretation of language in the arbitration provision regarding Block's contractual offset right to find the provision one-sided, discussed at Pet. 23-24, and two new arguments about whether there was a contract of adhesion and whether Block had standing to enforce the agreement. With respect to the latter two arguments, the court below simply did not rule on them and they are not presented for review. Moreover, all the arguments are encompassed by the second question presented in the Petition, which asks whether the trial court even had the authority to consider enforceability issues and interpret the contract language rather than defer to an arbitrator. If the court did not have this authority (and it should not, given the unambiguous language of the Arbitration Provision that disputes about the enforceability of the Provision should go to an arbitrator),

then the Court must vacate the trial court's interpretation of the contract language and remand to compel arbitration. *See Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003); Pet. 24-25 & n.7.

Finally, respondents' jurisdictional argument is misguided. The Court has jurisdiction over a "final" judgment under 28 U.S.C. § 1257(a), and the trial court's decision satisfies the finality requirement by clearly resolving federal issues under the FAA that had been appealed to the highest state court possible. *See Southland Corp. v. Keating*, 465 U.S. 1, 6 (1984). Moreover, the fact that the case had been temporarily removed to federal court on the day the Petition was filed presents no jurisdictional obstacle whatsoever. Regardless of where the case was pending at the time of the Petition, the prior interlocutory order denying arbitration remained reviewable. Even if the case had remained in federal court -- and it did not -- petitioners would still have had the right to seek review on the arbitration issue. Respondents have not cited any authority remotely supporting their theory that the temporary removal undercut the finality and reviewability of the arbitration ruling.

CONCLUSION

The Petition for a writ of certiorari should be granted.

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